United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,091

AMERICAN MAIL LINE LTD., *et al.*,

Appellants,

v.

JAMES W. GULICK, *et al.*,

Appellees.

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPENDIX TO THE BRIEFS

WARNER W. GARDNER
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Attorney for Appellants, American Mail Line Ltd., American President Lines, Ltd. and Pacific Far East Line Inc.

SHEA & GARDNER
Of Counsel .

July 31, 1968

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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*Counter designation by appellees.

DOCKET ENTRIES
[Civil No. 1347-68]

June 3	Complaint, appearance; Exhibits A thru F	filed
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June 7	Motion of pltfs. for preliminary injunction; c/s 6-7; P&A; exhibit; M.C.	filed
	* * * *	
June 26	Motion of defts. to dismiss or for summary judgment; c/m 6-26; statement: P&A: exhibits A thru O: M.C.	filed
June 27	Cross-Motion of plfts. for summary judgment; reply of pltfs to defts' Memorandum in support of Motion to dismiss or for summary judgment; M.C. 6-27-68	filed
June 27	Motion of defts. for summary judgment and Cross-Motion of pltfs. for summary judgemnt, argued and taken under advisement. (Reporter: Eva Marie Sanche)	Corcoran, J.
July 1	Transcript of proceedings, 6-27-68, Vol. 1, pp. 1 thru 21. (reported by Eva Marie Sanche. Court's copy.)	filed
July 1	Order denying pltfs' motion for summary judgment and granting motion of defts. for summary judgment. (N)	Corcoran, J.
July 3	Notice of appeal of pltfs; deposit by Basseches $5.00 (copy mailed to Nathan Dodell)	filed

COMPLAINT FOR INJUNCTION AGAINST WITHHOLDING, AND FOR ORDER GIVING ACCESS TO, GOVERNMENT INFORMATION

Jurisdiction

1. This action is brought under Section 3 of the Administrative Procedure Act, as amended by the Act of July 4, 1966 (88 Stat. 250), 5 U.S.C. § 552(a)(3), seeking preliminary and final injunction against withholding information from plaintiffs and ordering that it be disclosed.

Parties

2. (a) Plaintiff American Mail Line Ltd. is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Washington Building, Seattle, Washington, and with an office at 1625 Eye Street, N.W., Washington, D.C.

(b) Plaintiff American President Lines, Ltd., is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at 601 California Street, San Francisco, California, and with an office at 918 - 16th Street, N.W., Washington, D.C.

(c) Plaintiff Pacific Far East Line, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at 141 Battery Street, San Francisco, California, and with an office at 918 - 16th Street, N.W., Washington, D.C.

3. The Maritime Subsidy Board and the Maritime Administration, pursuant to delegation from the Secretary of Commerce, administer the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. § 1101 et seq. Often, as in the matters herein complained of, joint action is taken under the style of "Maritime Subsidy Board/Maritime Administrator." Defendant James W. Gulick is Acting Maritime Administrator and Chairman of the Maritime Subsidy Board.

The Acts Complained Of

4. Plaintiffs operate steamship services pursuant to operating-differential subsidy contracts entered into under the Merchant Marine Act, 1936. Under Section 603(b) of that Act they are paid operating-differential subsidy for the operation of their subsidized vessels which "shall not exceed the excess of the fair and reasonable cost of * * * wages and subsistence of officers and crew" under United States registry over the same costs of their principal competitors operating under foreign registry. Without significant exception the "fair and reasonable cost" of operating U.S.-flag vessels has hitherto been determined on the basis of crew sizes determined by collective bargaining between the operators and the off-shore labor unions. Under these collective bargaining contracts nine so-called C-4 type vessels were constructed and put in service by plaintiffs at various dates from 1961 to 1965; they were manned by a crew of 58 officers and men under collective bargaining agreements with the several unions. Subsidy vouchers have been presented and paid with respect to such 58-man crew at all times since these vessels entered service.

5. On April 11, 1968, (as stated by letter of April 12, 1968) the Maritime Subsidy Board determined with respect to each of these nine vessels that a crew in excess of 50 men "is not fair and reasonable and is not necessary for the efficient and economical operation of the vessels and shall be disallowed for subsidy rate-making and subsidy payment purposes." On the same day the Acting Maritime Administrator determined that the cost of wages and subsistence incurred for these eight "excess" men "is clearly improvident, unnecessary and excessive for the efficient and economical operation of each of the new conventional Pacific Coast C-4 design vessels and, subject to audit by the Comptroller, shall be disallowed" for all subsidy accounting purposes. No notice had been given plaintiffs that the issue was under consideration by the Board, and no submission of their case was or could have been made by plaintiffs. No

explanation, grounds or reasons for the determination is suggested in the April 12, 1968, letter advising of the action. A copy of such letter (those to the other two plaintiffs being identical) is attached as Exhibit A to this complaint. Inspection of the minutes of the Board/Administration indicate that the action was taken upon consideration of a staff memorandum of November 16, 1965, revised December 20, 1967, and that "copy of the foregoing memorandum and other pertinent documents are in the files of the Secretary."

6. Plaintiff American Mail Line Ltd. operates five such C-4 vessels, three of which entered service in 1962, one in 1964 and one in 1965. Under the April 11, 1968, determination it would be required to refund or write off about $1,700,000 of past subsidy accruals. Plaintiff American President Lines, Ltd. operates two such C-4 vessels which entered service in 1961. Under the April 11, 1968, determination it would be required to refund or write off about $900,000 of past subsidy accruals. Plaintiff Pacific Far East Line, Inc. operates two such C-4 vessels which entered service in 1962. Under the April 11, 1968, determination it would be required to refund or write off about $700,000 of past subsidy accruals. Corresponding sums are involved for the future so long as these vessels are operated under the governing collective bargaining agreements.

7. On April 22, 1968, these plaintiffs requested the Board/Administrator to reconsider this action, on the basis of facts and arguments to be submitted by plaintiffs by June 17, 1968. By letter of April 23, 1968, the Secretary of the Board/Administration advised that such reconsideration would be granted.

8. On May 6, 1968, plaintiffs met with ranking staff members of the Maritime Administration and requested, *inter alia*, (in view of the consistent refusal of the Board/Administrator in other proceedings to disclose the staff memorandum which led to their formal determination) that they be given a statement of the Board's reasons for such disallowance and a summary of the evidence before the

Board. The staff members advised that this was feasible, but that whether this information would be made available was a decision for the Board/Administrator. By letter of May 7, 1968, plaintiffs made formal request for such a statement and summary. A copy is attached as Exhibit B to this complaint. On May 14, 1968 (as advised by letter of May 16, 1968), the Board and Acting Administrator denied that request without explanation. A copy of the letter of May 16, 1968, so advising, is attached as Exhibit C to this complaint.

9. On May 21, 1968, plaintiffs filed a formal request under Maritime Administration General Order No. 99 [46 C.F.R. § 380.33] which prescribes the procedure by which to obtain access to Government information under the Act of July 4, 1966. A copy of such application is attached as Exhibit D to this complaint. On May 24, 1968, plaintiffs filed an anticipatory request for review of the expected denial of that request; such a request for review seems called for by General Order No. 99 [46 C.F.R. § 380.32(h)]. A copy is attached as Exhibit E to this complaint. By determination of May 29, 1968 (received May 31, 1968) the application for access to this information was denied; such denial is noted on the application itself, attached as Exhibit D to this complaint. By letter of May 29, 1968 (received May 31, 1968) the petition for review of that denial was in turn denied. A copy is attached as Exhibit F to this complaint.

10. Plaintiffs are in the course of preparing their factual and legal arguments for reconsideration, now due for filing on June 17, 1968. They do not know what matters to develop in these papers since they do not know the basis for the decision for which they seek reconsideration.

Prayer

WHEREFORE, plaintiffs pray that this Court

1. Issue a preliminary and a final injunction directing defendants to cease from withholding from plaintiffs the memorandum of November 26, 1965, as revised by memo-

randum of December 20, 1967, upon the basis of which defendants made their decision and determination of April 11, 1968, together with any other evidence considered by the defendants in making such decision and determination;

2. Order defendants to make available to plaintiffs such memoranda of November 26, 1965, and December 20, 1967; or

3. In lieu thereof, supply to plaintiffs a statement of the reasons for the decision and determination of April 11, 1968, and a summary of the evidence before the Board when it so decided and determined; and

4. Grant such other and further relief as to the Court seems proper.

WARNER W. GARDNER
ROBERT T. BASSECHES
Attorneys for Plaintiffs

[Jurat dated June 3, 1968.]

[Exhibit A (attached to Complaint)]

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON, D.C. 20235

April 12, 1968
IN REPLY REFER TO: 661

American Mail Line Ltd.
1010 Washington Building
Seattle, Washington 98101

Gentlemen:

The Maritime Subsidy Board, on April 11, 1968, found and determined, with respect to each of the C4 conventional type vessels and operators indicated below, that, effective with the date each vessel entered into the subsidized service:

I. The following crew complement:

	Number in Crew			
	States SS Co.	Pacific Far East Line, Inc.	American Mail Line Ltd.	Amer, Pres. Lines, Ltd.
	C4-S-lu	C4-S-lt	C4-S-ls and C4-S-lsa	C4-S-lq
Deck Department				
Master	1	1	1	1
Chief Mate	1	1	1	1
Second Mate	1	1	1	1
Third Mate	2	2	2	2
Radio Officer	1	1	1	1
Boatswain	1	1	1	1
Maintenance Man	3	3	3	3
A. B. Seaman	6	6	6	6
Ordinary Seaman	3	3	3	3
Total Deck	19	19	19	19

	Number in Crew			
	States SS Co.	Pacific Far East Line, Inc.	American Mail Line Ltd.	Amer, Pres. Lines, Ltd.
	C4-S-lu	C4-S-lt	C4-S-ls and C4-S-lsa	C4-S-lq
Engine Department				
Chief Engineer	1	1	1	1
1st Asst. Engineer	1	1	1	1
2nd Asst. Engineer	1	1	1	1
3rd Asst. Engineer	5	5	5	5
Chief Electrician	1	1	1	1
Electrician	1	1	1	1
Unlicensed Jr. Engineer	-	-	1	-
Chief Reefer Engineer	1*	1*	-	1*
Oilers	3	3	3	3
Firemen/Watchtenders	3	3	3	3
Wipers	2	2	2	2
Total Engine	19	19	19	19

*at monthly base wages not in excess of that of an Unlicensed Jr. Engineer (Day).

Steward Department				
Chief Steward	1	1	1	1
Chief Cook	1	1	1	1
2nd Cook	-	1	-	1
2nd Cook & Baker	1	-	1	-
Assistant Cook	1	1	1	1
Third Pantryman	-	1[1]	-	1[1]
Messman and/or Utilityman	8	7	8	7
Total Stewards	12	12	12	12
Total Crew Complement	50	50	50	50

[1] at monthly base wages not in excess of that of Messman and/or Utilityman.

is fair and reasonable and necessary for the efficient and economical operation of the ships and that the cost of wages and subsistence of each of the above-listed officers and ratings, as well as of Cadets (if and when carried) shall be eligible for subsidy rate-making and subsidy payment purposes.

II. On the basis of existing evidence on hand and as furnished by the operators, the cost of wages and subsistence of

(a) the Purser and/or Purser Pharmacist Mate on each ship;
(b) the Carpenter on each ship;
(c) all Deck Maintenance Men and/or Deck Utilitymen in excess of three on each ship;
(d) one Unlicensed Jr. Engineer and the Reefer Maintenance Man on each of the C4-S-ls and C4-S-lsa design type ships operated by American Mail Line Ltd.;
(e) the Second and Third Reefer Engineers on each of the following design type ships:

C4-S-lu of States Steamship Co.
C4-S-lt of Pacific Far East Line, Inc.
C4-S-lq of American President Lines, Ltd.

(f) the Third Wiper on each ship;
(g) the Night Cook & Baker on the C4-S-lt's of Pacific Far East Line, Inc., and the C4-S-lq's of American President Lines, Ltd.; and
(h) all Messmen, Utilitymen, Pantrymen, Bedroom Stewards, and/or Waiters in excess of a total of eight (8) in the Stewards Department on each ship

is not fair and reasonable and is not necessary for the efficient and economical operation of the vessels and shall be disallowed for subsidy rate-making and subsidy payment purposes.

III. On the basis of existing evidence on hand and as furnished by the operators, the amount of the monthly base wages of the Chief Reefer Engineer on each of the following type ships:

C4-S-lu of States Steamship Co.
C4-S-lt of Pacific Far East Line, Inc.
C4-S-lq of American President Lines, Ltd.

by which it exceeds the monthly base wages of an Unlicensed Jr. Engineer (Day) and the amount of the monthly base wages of the 3rd Pantryman on each of the following design type ships:

C4-S-lt of Pacific Far East Line, Inc.
C4-S-lq of American President Lines, Ltd.

by which it exceeds the monthly base wages of a Messman and/or Utilityman, and not fair and reasonable, are not necessary for the efficient and economical operation of the vessels and shall be disallowed for subsidy rate-making and subsidy payment purposes.

IV. If any or all of the subject new conventional C4 design type vessels should be retrofitted with automated features, the Board reserves the right to redetermine the eligibility for subsidy purposes of the appropriate manning scales.

Also on April 11, 1968, the Acting Maritime Administrator found and determined that:

V. The cost of wages and subsistence incurred in the employment of

(a) the Purser and/or Purser Pharmacist Mate on each ship;
(b) the Carpenter on each ship;
(c) all Deck Maintenance Men and/or Deck Utilitymen in excess of a total of three (3) on each ship;
(d) one Unlicensed Jr. Engineer and the Reefer Maintenance Man on each of the C4-S-ls and C4-S-lsa design type ships operated by American Mail Line Ltd.;

(e) the Chief Reefer Engineer (to the extent that his monthly base wage exceeds that of an Unlicensed Jr. Engineer (Day)), and the Second and Third Reefer Engineers on each of the following design type ships:

C4-S-lu of States Steamship Co.
C4-S-lt of Pacific Far East Line, Inc.
C4-S-lq of American President Lines, Ltd.

(f) the Third Wiper on each ship;

(g) the Night Cook & Baker on the C4-S-lt's of Pacific Far East Line, Inc., and the C4-S-lq's of American President Lines, Ltd.;

(h) the 3rd Pantryman on the C4-S-lt's of Pacific Far East Line, Inc., and the C4-S-lq's of American President Lines, Ltd., to the extent that his monthly base wage exceeds that of a Messman and/or Utilityman; and

(i) all Messmen, Utilitymen, Pantrymen, Bedroom Stewards and/or Waiters in excess of a total of eight (8) in the Stewards Department on each ship

is clearly improvident, unnecessary and excessive for the efficient and economical operation of each of the subject new conventional Pacific Coast C4 design type vessels and, subject to audit by the Comptroller, shall be disallowed for reserve fund and recapture purposes pursuant to the provisions of Section 286.4(a)(3) of General Order No. 31, 2nd Revision, and the appertaining Operating-Differential Subsidy Agreements with the respective companies.

Your attention is invited to the provisions of Section 6 of the Department of Commerce Order No. 117-A, with the request that you indicate your acceptance of the above actions by signing and returning the enclosed copy of this letter, noting the date of signing thereon.

Sincerely yours,

/s/John M. O'Connell
Assistant Secretary

Enclosure

exhibit D Page 1

FORM CD-244 (10-27-67) U.S. DEPARTMENT OF COMMERCE

NO. MA-106-68-5

RECORD INSPECTED (Date)

RECORD RETURNED (Date)

APPLICATION TO INSPECT DEPARTMENT RECORDS

(Pursuant to Section 552(a) (3), Title 5, U.S. Code (81 Stat. 54))

(See instructions on reverse)

Section I - APPLICATION INFORMATION

1. Name and address (Street, city, state, and zip code)

Robert T. Basseches
Shea & Gardner
734 - 15th Street, N. W.
Washington, D. C. 20005

To applicant: The action by the Department with respect to your application to inspect records is shown in item 8 below.

2a. Title, subject, or nature of requested record: SEE ATTACHMENT

2b. Approximate date: SEE ATTACHMENT

2c. Originator or author: SEE ATTACHMENT

2d. Recipient or addressee: SEE ATTACHMENT

2e. General description of record: SEE ATTACHMENT

3. Fees: a. Application fee (nonrefundable) to be paid when application to inspect records is made $2.00
b. Schedule of fees to cover costs of making records available for inspection is shown on reverse

4. Optional services available:

a. Are copies desired? [X] Yes [ ] No
Number 2

b. Is certification of copy desired? [X] Yes [ ] No

c. If record(s) are determined to be available:
[ ] I wish to inspect at the Inspection Facility at address indicated on reverse.
[X] Please mail copy(ies) to above address.

Section II - DETERMINATION OF AVAILABILITY

5a. Request received by: Secretary to Acting Administrator

5b. Date received: May 24, 1963

6. Routing: Secretary (Mr. Dawson)

7a. Title of official making determination: Secretary, Maritime Subsidy Board/Maritime Administration

7b. Date of determination: May 29, 1968

8. *Determination* - The record(s) which you have applied to inspect:

a. [ ] Are not in the custody of the Department of Commerce. We have forwarded your application to: _____ which we believe has custody of this record.

b. [ ] Cannot be identified. Additional information needed: _____

c. [X] Cannot be disclosed because: Item 1 is an intra-agency memo exempt under 5 U.S.C. 552(b)(5) *(See instruction No. 3 of Section II)* Items 2 and 3 previously denied by MSB/Actg. Admstr. on 5/16/68

d. [ ] The requested records will be made available upon receipt of estimated costs shown in item 9:
[ ] For your inspection at the Inspection Facility for five workings days begining _____
[ ] Copies will be held for you at the Inspection Facility.
[ ] Copies will be mailed to you at the address requested above

If you wish to inspect the record, return this form with the total amount shown in 9(a) e by check or money order, payable to "Department of Commerce Inspection Facility"

9. Costs of making disclosable record available for inspection: *(Schedule of fees on reverse)*

	Estimated (a)	Actual (b)	Refund (c)
a. Record search			
b. Copying			
c. Certification			
d. Postage			
e. Total	None	None	None

Verification _____

Additional information

USCOMM-DC 11491-P67

INSTRUCTIONS

[Omitted in printing]

Section III - REQUEST FOR REDETERMINATION

I request that a redetermination of the disclosability of the record(s) described in Section I be made.

I ☒ have ☐ have not enclosed a written statement supporting my belief that this record can be made available.

Signature [signature] Date [illegible]

Exhibit D
Page 3

Attachment to Application to
Inspect Department Records
Form CD-244

Description of Requested Records, pursuant to items 2(a)-(e) of form CD-244, is as follows:

1. Copies of any memorandum or written recommendation considered by the Maritime Subsidy Board/Acting Maritime Administrator in arriving at the determination of April 11, 1968 that the cost of wages and subsistence of designated ratings aboard the C4-S-lu vessels of States Steamship Company, the C4-S-lt vessels of Pacific Far East Line Inc., the C4-S-1s and C4-S-lsa vessels of American Mail Line Ltd., and the C4-S-lq vessels of American President Lines Ltd., plus a portion of the wages of certain other designated ratings aboard certain of those vessels, is not fair and reasonable and is not necessary for the efficient and economical operation of the vessels, and is clearly improvident, unnecessary and excessive for the efficient and economical operation of the vessels. The determination of the Maritime Subsidy Board/Acting Maritime Administrator was reported to each of the affected carriers by letter of April 12, 1968 from the Assistance Secretary of the Maritime Administration.

2. Copies of the "existing evidence on hand and as furnished by the operators" considered by the Maritime Sub-

sidy Board/Acting Maritime Administrator in arriving at the determination identified in paragraph (1) above and referred to in the April 12, 1968 letters of the Assistant Secretary of the Maritime Administration identified in paragraph (1) above.

3. In lieu of the documents requested in paragraphs (1) and (2), a statement, in detail sufficient to permit full and meaningful understanding of the action of the Maritime Subsidy Board/Acting Maritime Administrator with respect to each of the ratings referred to in paragraph (1) above for which a disallowance was made, explaining the reasons for the determination of the Maritime Subsidy Board/Acting Maritime Administrator identified in paragraph (1) above, and furnishing a summary of the evidence considered by the Maritime Subsidy Board/Acting Maritime Administrator in making that determination.

Attachment to Exhibit F

[Served April 26, 1968]

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

DOCKET NO. CA-42

GRACE LINE INC.
SHIPBUILDING CONTRACT APPEAL
CONTRACT NOS. FMB-104 and MA/MSB-8

Submitted November 7, 1967 Decided April 23, 1968

RULING OF THE MARITIME SUBSIDY BOARD ON THE PETITION OF STAFF COUNSEL FOR DECLARATORY ORDER UNDER SEC. 201.74 OF THE MARITIME ADMINISTRATION RULES OF PRACTICE AND PROCEDURE

J. W. Gulick, Chairman; Carl C. Davis, Member;
and James S. Dawson, Jr., Alternate Member

BACKGROUND

Grace Line Inc. (Grace), Bethlehem Steel Corporation (Bethlehem) and the Maritime Subsidy Board (Board) were parties to Construction-Differential Subsidy Contracts Nos. FMB-104 and MA/MSB-8 (Contracts). Grace disputed the quality of certain salt water valves installed on the vessels constructed and on April 12, 1967, the Chief, Office of

Ship Construction (Contracting Officer), pursuant to Article 36 of the Contracts, rendered the final decisions that the valves furnished by Bethlehem fully complied with all the provisions and requirements of the Contracts. Exercising its rights under the same Article, Grace appealed to the Board on May 10, 1967. It may be noted here that the financial interests of the Government are not involved in the outcome of this dispute. The hearing of the dispute and the rendering of a decision with regard thereto is a service to the parties, as provided by Article 36 of the Contracts.

At its meeting of June 20, 1967, the Board noted the appeal and directed that Chief Hearing Examiner Pfeiffer, or at his election Examiner Hislop, be its Representative for purposes of hearing the appeal and reporting thereon. This referral for a hearing contained no special instructions to the Representative. Consequently, from his past experience and prior decisions of the Board, he could not reasonably have assumed that the appeal would be other than *de novo* in character. The Chief Hearing Examiner elected to become the Board's Representative. At the prehearing conference of July 25, 1967, he alluded to the existence (and obliquely to some of the discussional portions) of an administrative memorandum transmitting the subject appeal from the Contracting Officer to the Board[1] subsequently identified as bearing the date of June 13, 1967. Counsel for Grace and Bethlehem naturally joined in asking for discovery of that document.[2] Staff Counsel opposed production of the discussional portion of the memorandum, but was willing to produce the recommendational portion thereof which was adopted by the Board and is available to the public.[3] With allusion to the new "Public Information Act", the Repre-

[1] Transcript, p. 14. For the reasons stated herein, the Board does not accept the Representative's view as expressed on page 5 of his September 15, 1967, ruling that there is a legal or moral requirement to disclose the contents of inter-office memoranda.

[2] *Id.* at 15.

[3] *Id.*

sentative directed Staff Counsel to submit a memorandum on the question within ten days and after consultation with the Maritime Administration General Counsel,[4] with copies to both parties. He further indicated that a ruling would be deferred until that time.[5]

On August 4, 1967, Staff Counsel submitted his memorandum and Grace answered on August 17, 1967. In his ruling of September 15, 1967, the Representative denied the request for discovery. The sole basis recited was that procedurally General Order 99,[6] a regulation governing release of records of the Maritime Administration (which term, by definition therein, includes the Board), was controlling and, therefore, the Representative was without power to direct release of the requested memorandum.

On September 25, 1967, Grace requested reconsideration of the ruling with the result that the Representative issued a ruling and order on October 12, 1967, which (1) directed Staff Counsel to serve a copy of the requested memorandum on all parties to the proceeding within five days and (2) vacated the prior ruling to the extent inconsistent therewith. Grace had argued that General Order 99 was not intended to supplant or modify the Rules of Practice and Procedure (Rules),[7] specific mention being made of Sec. 201.109 thereof, entitled "Discovery and production of documents". However, Grace arrived at this conclusion through

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[4]The inclusion by the Representative in his direction that Staff Counsel consult with the General Counsel relative to the availability of internal memoranda under the new statute was not violative of the principle of separation of functions between officials who decide and those who participate as a party to the hearing. However, consonant with that principle, Staff Counsel does not receive guidance or direction from the General Counsel in hearing matters and elected not to seek the consultation.

[5]Transcript, pp. 18-19 and 65.

[6]32 F.R. 12845 (September 8, 1967).

[7]General Order 41, 3d Rev., as amended (29 F.R. 14475, October 22, 1964).

reference to Sec. 380.36 of General Order 99 as controlling, rather than Sec. 380.33, as cited by the Representative in his first ruling.

The Representative accepted Grace's argument that he was an "other authority" within the meaning of Sec. 380.36 of General Order 99, but instead of following the procedure thereof, considered this view as sufficient to utilize Sec. 201.109 of the Rules to direct Staff Counsel to produce the document for disclosure. Thus he accepted the proposition that as a Representative of the Board he could order disclosure of *any* Maritime Administration or Board records without limitation, so long as he also decided that the document was not "privileged". The obvious danger of this view of complete autonomy by a Representative was properly contested by Staff Counsel.

Pursuant to Sec. 201.74 of the Rules, Staff Counsel petitioned the Board for a Declaratory Order on October 19, 1967, followed by an Answer from Grace dated November 1, 1967. This Petition and Answer are now before the Board.

ARGUMENTS

Staff Counsel contends that uncertainty results from the Representative's incorporation of General Order 99 into the Rules and requests a Declaratory Order finding:

> "(1) General Order 99 is not incorporated into the Board Rules of Practice and Procedure and is not a proper device for obtaining documents in a hearing.
>
> "(2) The Appellant [Grace], as a private individual, separate and apart from its incidental capacity as a party to this proceeding may file a formal request on Form CD-244 and submit such form to the Maritime Administration Public Information Office as provided for by General Order 99.
>
> "(3) The memorandum of the Chief, Office of Ship Construction transmitting the appeal to the Board, is an internal memorandum not available under the Board Rules of Practice and Procedure.

"(4) Neither the Representative nor Grace has shown that prejudicial damage in the preparation of their case will result without production of the document particularly in view of the *de novo* character of the appeal."

Grace presents arguments of both procedural and substantive character. Procedurally, Staff Counsel's Petition is alleged to be an unauthorized and mislabeled interlocutory appeal and reference is made to the filing thereof two days later than the time within which Staff Counsel was directed by the Representative to serve a copy of the subject memorandum upon all parties. Substantively, Grace agrees with Staff Counsel that General Order 99 is not incorporated into the Rules but contends that "the Representative never relied upon that Order as a basis for his order to produce, and urges that the Representative's ruling and order not be disturbed." Its supporting reasons are that elemental fairness and Sec. 201.183 of the Rules, entitled "Ex parte communications," overcome any claims of privilege against disclosure. In addition, Grace states, and offers refutation to Staff Counsel's argument that the Representative is without authority to order production of Maritime Administration records generally, which argument Grace tentatively finds present in the Petition of Staff Counsel. In this latter regard, Grace contends that Staff Counsel cannot raise the question of the Representative's authority to order production of Maritime Administration records in the Petition for a Declaratory Order since he had failed to do so earlier.

DISCUSSION

The Board does not accept Grace's contention that Staff Counsel is attempting to circumvent Sec. 201.133 of the Rules dealing with interlocutory appeals, or its conclusion that "no substantial 'uncertainty'" exists. After review of the record only insofar as it pertains to disclosure of the subject memorandum of the Contracting Officer, the Board is satisfied that the questioned applicability of the recently promulgated General Order 99 to the issue presents an

"uncertainty" within the meaning of that term in Sec. 201.74 of the Rules.

The development to this point has clearly established the "uncertainty" as to the Representative's authority to order production of Maritime records. Moreover, the later ruling by the Representative clearly demonstrates his willingness to adopt Grace's argument that he has authority to invoke Sec. 380.36 of General Order 99 (as an "other authority") to order production of the subject document so long as he determines such action is not violative of the proscription in Sec. 201.109 of the Rules. In the opinion of the Board, Sec. 380.36 addresses itself to cases where disclosure "is sought" by court subpoena and like compulsory process, and that even in those cases the disclosures demanded are not *automatically* complied with but are "referred for determination." Grace's contention that the Representative did not rely on General Order 99 in his October 12, 1967, order to produce is beyond comprehension. He, in fact, accepted Grace's contention that he should use Sec. 380.36 instead of Sec. 380.33 of that General Order in reaching the conclusion to reverse his prior ruling.

As to the time period for service of the subject memorandum as directed by the Representative in his ruling and order of October 12, 1967, Grace errs in simply adding five days to the date of issuance of the ruling and order. Under Sec. 201.51 of the Rules, Staff Counsel was entitled to omit an intermediate Saturday and Sunday in the calculation of the five-day period. The Petition filed by Staff Counsel could not have contested the reasons adopted in the Representative's later ruling prior to its issuance. Thus, it is not apparent how it can be protested that he should have raised the issue at an earlier point.

The Board confirms the conclusion of both Grace and Staff Counsel that General Order 99 is in nowise incorporated into the Rules. General Order 99 procedure is available to any citizen of the United States who seeks access to records of the Maritime Administration (including the

Board). However, it does not supersede nor restrict the procedures available to parties in a proceeding under the Rules. In other words, a party to a proceeding may seek access to Maritime Administration records by means of General Order 99 just as any other citizen. Therefore, in a formal proceeding subject to the Rules, *any* reliance by the Representative upon General Order 99 as providing him with unrestricted authority to direct the production of the subject memorandum is incorrect and inappropriate. Consequently, the issue is reduced to whether the memorandum of the Contracting Officer dated June 13, 1967, is subject to discovery under Sec. 201.109 of the Rules.

As indicated by Article 36 of the Contracts, a Contractor or Owner may appeal a final decision of the Contracting Officer "by mailing or otherwise furnishing said Chief, Office of Ship Construction, a written appeal addressed to the Board." The appeal papers in this instance were transmitted to the Board with an administrative covering memorandum which concluded with a recommendation to the Board that it assign the appeal to a Representative to hear the appeal and report to the Board. The material sought in this matter is the discussional portion of the transmittal memorandum.

In the prehearing conference, Staff Counsel properly indicated that Grace and Bethlehem could have a copy of the Board's approved recommendation but not the administrative covering memorandum. The approved recommendation is an available public record. The memorandum, on the other hand, is a privileged intra-agency communication from a member of the staff to his superiors. As such, the limitation to documents "not privileged" contained in Sec. 201.109 of the Rules coupled to the authorities recited by Staff Counsel[8] provide ample basis for the conclusion that

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[8] *Kaiser Aluminum & Chemical Corporation v. United States*, 141 Ct. Cl. 38 (1958); *Associated-Banning Company et al. v. United States*, Docket No. 13, 384, D.C. Cir (September 21, 1956).

the memorandum is not subject to discovery under the Rules.[9]

Having found the subject memorandum to be a privileged intra-agency communication, discussion upon the several other questions raised in the Petition and Answer is not required. However, certain cursory comments appear desirable. First, Sec. 201.183 of the Rules, entitled "Ex parte communications", does not apply to the instant matter as suggested by Grace. The decision of the Contracting Officer is the end product of a procedure based on Article 36 of the Contracts and not embraced within the Rules. No proceeding, within the meaning of the Rules, exists until the Board acts on the appeal. From the time of such action, the Rules apply, including Sec. 201.183 thereof. In regard to the memorandum of the Contracting Officer, it is purely administrative and intra-agency, forms no part of the proceeding, and, therefore, is not subject to Sec. 201.183 of the Rules. It is worth repeating here that the Board's referral to this matter to its Representative for hearing the appeal included no restrictive instructions relating to the procedure he should follow, the clear consequence being that the hearing be conducted in the usual manner.

Second, in the course of a hearing, the Representative's power to direct production of a document of the Maritime Administration (including the Board) is not without limita-

[9]In passing, and as a matter of general interest, this conclusion is consistent with the following pertinent observation made by the Attorney General of the United States regarding the unavailability of internal communications even under the new "Public Information Act":

> ". . .[I]nternal communications which would not routinely be available to a party to litigation with the agency, *such as* internal drafts, memoranda between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency or staff groups, *remain exempt so that free exchange of ideas will not be inhibited.*" (Emphasis supplied)

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), p. 35.

tion. The secretary of the Maritime Administration/Board, who was and is custodian of the memorandum,[10] was not asked to produce it pursuant to Sec. 201.4 of the Rules.

Third, Staff Counsel does have the right to limit his participation in a proceeding according to the terms of Sec. 201.31 of the Rules and the exercise of that right in the circumstances at hand (namely, improper reliance upon General Order 99 and the privileged character of the requested memorandum) was appropriate.

In summary, the Board hereby adopts the findings "1" through "3" requested of it in the Petition for Declaratory Order by Staff Counsel dated October 19, 1967. It is not deemed necessary to consider the requested finding "4".

Accordingly, the ruling of the Representative, dated October 12, 1967, is reversed, and the matter is remanded to the Representative for further hearing of the appeal consistent herewith and the presentation of a recommended decision to the Board.

SO ORDERED BY THE
MARITIME SUBSIDY BOARD

DATE: April 23, 1968

/s/ John M. O'Connell
John M. O'Connell
Assistant Secretary
Maritime Subsidy Board

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[10] Administrator's Order No. 2 (amended), Amendment 1 (September 19, 1967), which is available in the Office of Public Information, Maritime Administration, Washington, D. C.

MOTION FOR PRELIMINARY INJUNCTION

Come now the attorneys for American Mail Line Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc., plaintiffs herein, and move that this Court enter preliminary injunction pending the final hearing and determination of this action ordering that:

1. Defendants cease withholding from plaintiffs the memorandum or memoranda of November 26, 1965, and December 20, 1967, upon the basis of which they took action on April 11, 1968, disallowing for all subsidy purposes the cost of wages and subsistence for eight positions on each of nine vessels operated by plaintiffs under operating-differential subsidy contracts, and any other evidence considered by the defendants in reaching that decision and determination;

2. Defendants make available to plaintiffs the memoranda and evidence above described; or

3. Defendants, in lieu of the actions enjoined and directed in paragraphs 1 and 2 above, supply to plaintiffs a statement of the reasons for their action of April 11, 1968, disallowing for all subsidy purposes the cost of wages and subsistence for the eight positions on each of nine vessels operated by plaintiffs under operating-differential subsidy contracts, and a summary of the evidence before the Board when such decision and determination was made.

The grounds of such motion are the facts recited in the verified complaint of plaintiffs and the memorandum of points and authorities in support of such motion filed herewith.

Respectfully submitted,

WARNER W. GARDNER
ROBERT T. BASSECHES

Attorneys for Plaintiffs

June 7, 1968

[Filed for Defendant May 13 1965]

IN THE UNITED STATES COURT OF CLAIMS

PACIFIC FAR EAST LINE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 119-63
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

DEFENDANT'S REQUEST FOR REVIEW OF COMMISSIONER McMURRAY'S RULING OF MAY 7, 1965.

Defendant respectfully requests that the Court review Commissioner McMurray's ruling of May 7, 1965, denying defendant's motion to quash a subpoena duces tecum served by plaintiff upon the Secretary of the Maritime Administration on May 6, 1965, and that the stay granted by the Commissioner to permit the filing of this request be extended until the Court acts thereon.

Defendant further requests that the Court set aside Commissioner McMurray's ruling and issue an order granting defendant's motion on the grounds that the ruling was (i) erroneously issued, an abuse of discretion and (ii) adversely affects substantial rights of defendant.

Facts

Between May 4 and May 7, 1965, Commissioner McMurray conducted the second and final trial session in this case. On May 4, plaintiff tested its case after examining numerous witnesses and placing into evidence more than 100 exhibits, many of which were furnished pursuant to an earlier subpoena duces tecum served on the Secretary of the Maritime Administration on January 25, 1965, and a motion for call granted on April 19, 1965.

After the Government rested, and during plaintiff's rebuttal on May 6, plaintiff served a subpoena decus tecum on the Secretary of the Maritime Administration calling for production of two specified documents as well as "any other staff memoranda or recommendations that dealt with the inclusion of exclusion of nonsubsidized voyages from reserve and recapture accounting of PFEL between January 1, 1953 and December 31, 1962." A copy of the subpoena is attached hereto as Exhibit "A".

In accordance with Rule 51(c), defendant moved to quash the subpoena on the grounds that it was unreasonable, oppressive and called for the production of intra-agency advisory opinions not judicially discoverable under the doctrine of *Kaiser Aluminum & Chemical Corporation v. United States,* 141 Ct. Cl. 38, 157 F.Supp. 939 (Ct. Cl. 1958). Commissioner McMurray denied that motion (copy of oral ruling attached hereto as Exhibit "B"), despite plaintiff's failure to show any *good cause or necessity* for production.

Argument

[Omitted in printing]

Conclusion

For the foregoing reasons, defendant respectfully requests the Court to review and set aside Commissioner McMurray's ruling of May 7, 1965, and to enter an order quashing the subpoena duces tecum.

Respectfully submitted,

JOHN W. DOUGLAS
Assistant Attorney General
Civil Division

LAWRENCE F. LEDEBUR

ALLAN J. WEISS
Attorneys, Admiralty & Shipping Section
Department of Justice
Washington, D. C. 20530

Of Counsel

SUBPOENA DUCES TECUM

United States Court of Claims

PACIFIC FAR EAST LINE, INC.

vs. No. 119-62

THE UNITED STATES

To John M. [illegible]
James S. Dawson

Maritime Administration

Washington, D.C.

You Are Hereby COMMANDED to appear at Courtroom No. 2, Court of Claims Building
(Room number) (Building)
1325 K Street, N.W. Washington, D.C.
(Street number) (City) (State)
at 10:00 o'clock a.m., on the seventh day of May, 1965,
before Paul H. Mahaney, Commissioner of this Court;
to bring with you Memorandum or comments to the Maritime Administrator from a Division of the Office of Government Aid recommending financial assistance under subsidized operations of 1956 ore voyages with government bareboat chartered vessels leading to a letter dated March 1955 from the Administrator to MSAC; the staff recommendation dated on or about November 5, 1952 (see attached sheet);
then and there to testify in the above-entitled cause and not to depart without leave. This subpoena is issued on the application of the {Plaintiff / Defendant}.

Mark P. Hillis
Attorney for Plaintiff.
529 Tower Building, Washington, D.C.
(Address)

Attorney for Defendant.
(Address)

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, D. C., this 5th day of September, 1962.

Mark T. Pelcovits
Clerk

NOTE—If the place of trial is more than 100 miles (by the shortest usual means of travel) from the place where this subpoena is served, the person served may demand the allowance as optional unless there is attached to the subpoena an order of the Court requiring his appearance notwithstanding the distance of travel. In any event, response to the subpoena will entitle the person served to the fees and mileage allowed by law.

RETURN OF SERVICE

Summoned the above-named witness by delivering a copy to h____ and tendering to h____ the fees for one day's attendance and mileage allowed by law, on the _____ day of _____,
19____, at _____

Dated _____

_____
Name, and title, if any

*Fees and mileage need not be tendered when subpoena is issued on behalf of the United States or an officer or agency thereof.

EXHIBIT NO. A

Attachment to Subpoena Duces Tecum to James S. Dawson Returnable May 7, 1965

(continued from preceding page)

which led to the Administrator's action of November 17, 1953, communicated to PFE in the Administrator's letter of November 25, 1953; and any other staff memoranda or recommendations that dealt with the inclusion or exclusion of nonsubsidized voyages from reserve and recapture accounting of PFE between January 1, 1953, and December 31, 1962.

EXHIBIT NO. B

AFTERNOON SESSION (2:08 p.m.)

THE COMMISSIONER: Before we proceed with the examination of the witness, I want to add this statement to the record:

With respect to the motion of counsel for defendant to quash the subpoena, which was discussed earlier today, in the limited time I have had to consider the matter, I would like to place in the record this statement:

The record already contains a number of exhibits furnished plaintiff which are similar to those sought by plaintiff's subpoena. If the matter involved a legal opinion prepared by counsel for an official of the department involved, I would be inclined to quash the subpoena and refuse to admit that type of document in evidence. I decline to quash the subpoena under consideration here and overrule defendant's motion.

Defendant has not claimed privilege or secrecy or any other unusual basis for the motion.

I would remind counsel that there is adequate provision under the court's rules to move for a review of my ruling by the court.

I want to make one further reference to the list of cases referred to by counsel for the parties. I want to refer counsel to the case of Will Weiss—no relation to present counsel, so far as I know—you are familiar with that, no doubt, in which the report, including an opinion and recommendation by the Commissioner was filed by Commissioner W. Ney Evans of this court.

All I have here is—I did not have the full title of the case and asked my secretary who got this, but the court action on that I do not have with me.

MR. SCHLEFER: Sir, I have it here.

THE COMMISSIONER: Well, it is Will, W-I-L-L, Weiss, Receiver of Utility Electronics Corporation versus the United States, No. 21-53.

I think this report and opinion of the Commissioner in that case is the most complete and exhaustive survey of the question covered by the report and opinion that I have seen.

Let us proceed.

MR. WEISS: If I may, Mr. Commissioner, it is respectfully requested that all further proceedings in this matter of the production of these documents be stayed in order to permit the Government to appeal to the court or in the alternative, to permit the Attorney General of the United States and the Maritime Administrator to consult concerning the right to invoke the executive privilege. This subpoena was, if I may add, served yesterday, returnable this morning. It calls for the production of not only my two specific items by names and date, but goes on to say: "And any other staff memorandum or recommendations that deal with the inclusion or exclusion of non-subsidized voyages," all the way from January 1, 1953 through and including December 31, 1962.

Not only is that ambiguous without specifying the documents by date, name, or number or other identifying manner, but as far as I know, this involves a question of law which I think should be appealed to the court and we again request that this matter on the documents be stayed in order to allow us to appeal or in the alternative, again I can't speak for the Attorney General or the Maritime Administrator, but I have been advised by my superiors that they would wish if the court denies the motion to quash, to consider the problem of invoking the executive privilege.

MR. SCHLEFER: If the court please, I certainly have no objection to a stay to permit Mr. Weiss to take whatever steps he may wish, either to consult the Attorney General or--I think the proper party to claim executive privilege would be the Secretary of Commerce, rather than the Mari-

time Administrator. I think a specified time should be put in the stay. It should be certainly not more than two weeks; otherwise, this is going to drag on, and that should be ample time for him to get whatever decison he needs out of the Attorney General or the Secretary of Commerce, or to appeal to the court and get such further relief as he may obtain from the court itself. So as I say, I have no objection to a stay provided it is a reasonable, specific time within which the Government must take steps.

THE COMMISSIONER: Well, I might add to my statement, which is perhaps unnecessary, that of course nothing was said about a claim of privilege when the matter was discussed earlier here, and that apparently—namely, a claim of privilege would be the only proper basis for the motion to quash, in veiw of the circumstances in this case which I have outlined in my ruling, which is now in the record.

But as I said before, the court rules provide for an appeal from my ruling and the ruling will remain in effect, unless overruled by the court.

And with respect to the matter of privilege, if that is brought in, it will be given appropriate consideration, but since we are near the closing of this case, I think the claim of privilege, if it is going to be filed, should be done within ten days from today.

Let us proceed with the regular order.

EXHIBIT NO. C

U.S. DEPARTMENT OF COMMERCE
Maritime Administration
Washington 25, D.C. COPY

Office of the Administrator

May 6, 1965

Honorable Nicholas deB. Katzenbach
Attorney General
Washington, D. C. 20530

Dear Mr. Attorney General:

The subpoena duces tecum, copy attached, served upon John M. O'Connell, Assistant Secretary, Maritime Administration, in *Pacific Far East Line, Inc. v. United States*, Court of Claims No. 119-63, requests certain documents from the official files of the Maritime Administration.

All the documents requested are internal staff memoranda and/or recommendations. These memoranda and recommendations are merely advisory in nature and do not necessarily reflect the views of, or represent the position ultimately taken by, the Maritime Administration. They are thus advisory communications on intra-office matters. A disclosure of the contents of documents of this nature would tend to discourage the staffs of Government agencies preparing such papers from giving complete and candid advice, and would thereby impede effective administration of the functions of such agencies.

In view of these considerations, I am of the opinion that the disclosure of the documents in question would be injurious to the public interest and are privileged.

Furthermore, I do not believe that plaintiff has shown the requisite necessity to compel their production.

In support of my position, I refer you to *Kaiser Aluminum & Chemical Corporation v. United States*, 141 Ct. Cl. 38 (1958) and *United States v. Reynolds*, 345 U.S. 1 (1953).

I therefore request that you either move to quash the subpoena under Rule 51(c) or respectfully decline to comply with the subpoena duces tecum.

Sincerely yours,

/s/ J. W. Gulick
J. W. Gulick
Acting Maritime Administrator

Enclosure

ORDER

CLERK'S OFFICE

Washington, D.C., June 9 1965

To Attorney of Record and Assistant Attorney General, and Commissioner McMurray

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the defendant's request for review of Commr's Ruling of May 7 1965 denying motion to quash subpoena the following order:

By the Court: DENIED, without prejudice to the right of the Secretary of Commerce to file within ten days a claim of executive privilege.

Very truly yours,

Frank Peartree
Clerk, Court of Claims.

[Filed June 26, 1968, 5:15 p.m.]

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants, by their attorney, the United States Attorney for the District of Columbia, respectfully move the Court to dismiss this action for failure to state a claim upon which relief can be granted. In the alternative, defendants move for summary judgment on the ground that there is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law.

In support of the motion for summary judgment, and in opposition to plaintiffs' motion for a preliminary injunction, defendants file herewith the affidavit of John M. O'Connell, Assistant Secretary of the Maritime Subsidy Board of the Maritime Administration, as Government Exhibit A, and related documents as Government Exhibits B through O.

/s/
DAVID G. BRESS
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
NATHAN DODELL
Assistant United States Attorney

STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9(h)

1. The minutes of the Maritime Subsidy Board/Maritime Administrator for the meeting of April 11, 1968 state as follows:

> The Maritime Subsidy Board considered memorandum dated November 26, 1965, revised Decem-

ber 20, 1967, recommending that the Board approve for subsidy purposes manning scales for the conventional C 4 design type vessels operated by States Steamship Company, Pacific Far East Line, Inc., American Mail Line, Ltd. and American President Lines, Ltd.

After discussion, upon the "yea" vote of Chairman Gulick, Member Davis and Alternate Member Dawson, the Maritime Subsidy Board found and determined with respect to each of the C 4 conventional type vessels and operators, as indicated below, that, effective with the date each vessel entered into the subsidized service:

(Quote Recommendations I thru IV, pages 27 thru 30)

Thereafter, Chairman Gulick announced that in his capacity as Acting Maritime Administrator he had found and determined that:

(Quote Recommendation V, pages 30 and 31)

Copy of the foregoing memorandum and other pertinent documents are in the files of the Secretary.

2. The memorandum referred to is an internal memorandum, prepared and written by officers and staff of the Board, relating to plaintiffs' requests for approval of manning scales. Attached to this memorandum are letter submissions from the plaintiffs (and one other subsidized operator not a party to this action) which state, and request approval for, the manning scales. Except for these letter submissions, the memorandum and all other attachments to it were prepared by the staff personnel of the Board, and embody their statements and views. They set forth administrative bases for action, opinions and analyses of various staff officers and employees, and recommendations as to the action that should be taken by the Board. This is a staff report within the agency from subordinates to their superiors.

3. By letter of April 22, 1968, counsel for plaintiffs, Warner W. Gardner, Esq., petitioned for reconsideration of the

decision of the Maritime Subsidy Board/Maritime Administrator, asking leave to make a "full presentation of the facts and the arguments which show the April 11 decision to be wrong." Mr. Gardner also sought to assure that plaintiffs would have the opportunity to petition the Secretary of Commerce for review upon the Board's final action on the petition for reconsideration.

4. By letter of April 23, 1968, the Secretary of the Board advised plaintiffs that the petition for reconsideration would be carefully considered; and that the time for filing a petition for review by the Secretary of Commerce would run from the date of the Board's action finally disposing of the issues presented by the petition for reconsideration.

5. By letter of May 7, 1968, plaintiffs confirmed an oral request of May 6, 1968 for a statement of the basis of the Board's decision of April 11, 1968, and for a summary or statement of the evidence considered by the Board in making that decision. Plaintiffs also requested other documents and information relating to meaning.

6. By letter dated May 16, 1968, the Assistant Secretary of the Board notified plaintiffs that the April 11, 1968 decision would be stayed until the petition for reconsideration would be acted upon. The Assistant Secretary advised that the Maritime Subsidy Board/Maritime Administrator denied plaintiffs' request for a statement of the basis of the April 11 disallowances and a summary or statement of the evidence considered in taking those actions. However, the Board determined to make every reasonable effort to locate [historical] information respecting manning which may be available to the Maritime Administration to which plaintiffs desired access, and to make such information available as may properly be made available under applicable laws, rules and regulations.

7. On May 21, 1968, plaintiffs filed an Application to Inspect Records with the Administration. Plaintiffs sought: (1) a copy of the staff memorandum considered by the Maritime Subsidy Board/Maritime Administrator; (2) copies of

the evidence considered by the Maritime Subsidy Board/ Maritime Administrator in arriving at the determination of April 11, 1968; and (3) in lieu of the items requested in paragraphs (1) and (2), a statement explaining the reasons for the determination of April 11, and a summary of the evidence considered by the Maritime Subsidy Board/Maritime Administrator in making those determinations.

8. The Secretary of the Board replied by letter of May 29, 1968, that the Board does not disclose internal memoranda. However, the Secretary stated that an exhaustive search had been made for a variety of records and documents plaintiffs requested, and that such records and documents would be made available to plaintiffs. The Secretary further advised that the Acting Administrator and the Members of the Board would continue to maintain an open mind in the consideration of the petition for reconsideration; and that "whatever action the Board/Acting Administrator may take in respect thereto will be set forth in a formal opinion ("A" Series), with discussion and explanation of the reasons for the conclusions reached by the Board/ Acting Administrator."

9. If the decision of the Maritime Subsidy Board/Maritime Administrator upon the petition for reconsideration is unfavorable to plaintiffs, they may petition the Secretary of Commerce for review. The ultimate administrative action in determining the operating-differential subsidy "wage" rates, as discussed in the affidavit of John M. O'Connell, filed herein as Government Exhibit A, may be the subject of an action in the Court of Claims.

/s/
NATHAN DODELL
Assistant United States Attorney

/s/
DAVID G. BRESS
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

GOVERNMENT EXHIBIT A

AFFIDAVIT OF JOHN M. O'CONNELL

John M. O'Connell, upon being duly sworn, deposes and says as follows:

1. Affiant is employed by the Maritime Administration at its principal office at Washington, D.C., as Assistant Secretary of the Maritime Subsidy Board of the Maritime Administration (hereinafter referred to as the Board). Affiant has held this position continuously since May 1962. As Assistant Secretary of the Board, affiant shares the responsibility of the Secretary of the Board for the "minutes" of Board meetings and for legal custody of the seal, property, papers, and records, including legal and public records, of the Board. In the absence of preoccupation of the Secretary of the Board, affiant assumes the functions of the Secretary of the Board. This affidavit is made for such purposes as may be required in the defense of an action now pending in the United States District Court for the District of Columbia styled *American Mail Line Ltd., et al., v. James W. Gulick, Acting Maritime Administrator and Maritime Subsidy Board,* Civil Action No. 1347-68.

2. Based upon the records of the Board and personal attendance thereat in my official capacity, affiant states that the Board held a meeting on April 11, 1968, at which time formal Board action was taken on pending requests for approval of manning scales on certain of their newly constructed subsidized vessels which had been submitted by the plaintiffs.

3. In the above-captioned action filed pursuant to 5 U.S.C. § 552 (P.L. 90-23, 81 Stat. 54), effective July 4, 1967, the plaintiffs are seeking access to an internal memorandum and other evidence before the Board when it formally acted upon plaintiffs' requests for approval of manning scales at the aforementioned meeting on April 11, 1968.

4. The official records before the Board at the aforementioned meeting, insofar as they concern the manning scales

of the plaintiffs, consist solely and exclusively of the aforementioned internal memorandum, including attachments thereto, and except for letter submissions from the plaintiffs (and one other subsidized operator not a party to the action) which state, and request approval of, the manning scales of certain of their vessels, said memorandum and attachments embody the statements and views of staff personnel of the Board. They set forth administrative bases for action, opinions of various staff officers and employees, and recommendations as to the action that should be taken by the Board. This is merely a staff report within the agency from subordinates to their superiors. The latter may accept the contents and opinions thereof, may arrive at different conclusions than those suggested, or may reject the entire memorandum and/or direct further study. The Board may utilize a suggested format in taking action, but the memorandom is not adopted. It is, therefore, an intra-agency communication which serves as an initial basis for a recommended course of action. As such, it is not routinely available to a private party in litigation with the Board. Because of the important function of the staff memorandum in the administration of a program involving payments from the United States Treasury in the form of subsidy grants, it is imperative that it be a full and frank disclosure of all opinions and analyses ascertained by the numerous staff officers and employees. The Board cannot effectively perform its statutory function under the Merchant Marine Act, 1936, as amended, and administer its long-range (20 year) subsidy contracts without having the benefit of such full and frank disclosure of the opinions and conclusions of its officers and employees. Due to the institutional nature of the Board, it is necessary that such opinions and conclusions be set forth in writing.

5. In a document entitled "Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction", filed with the Court by the plaintiffs, the claim is made that the Board, in an official action on April 11, 1968, "approved" the internal staff memorandum, "adopted

its conclusions", and thereby "converted that memorandum into a 'final opinion(s) . . . as well as [an] order made in the adjudication of [a] case(s)'." Based upon examination of the "minutes" of said meeting, which is a public document, knowledge of the Board's procedures, experience with and responsibility for custody of the records of the Board, and actual presence at the afore-mentioned meeting, affiant states without qualification that the Board did *not approve* the internal staff memorandum and *convert* it into a final opinion and order, as claimed by the plaintiffs. The suggested wording of that portion of the memorandum entitled "Recommendation" was utilized by the Board and, with insignificant stylistic changes, was set forth in the letter to all plaintiffs dated April 12, 1968, a copy of which letter was attached as an exhibit to the complaint in the instant action.

6. Based upon an examination of the official regulations and records of the Board, and on personal knowledge, the following statement describes the opportunities for review and/or appeal, of the substantive determination made at the afore-mentioned meeting of the Board on April 11, 1968, afforded to plaintiffs, as provided under the rules and regulations of the Department of Commerce and the Board:

a. **Pending "Reconsideration" by the Board**

On April 22, 1968, plaintiffs petitioned the Board for "reconsideration" of its action of April 11, 1968. By letter of April 23, 1968, said petition was acknowledged as "timely". Subsequently, by letter dated May 29, 1968, plaintiffs' counsel was advised as follows:

> "Please rest assured that the Acting Maritime Administrator and Members of the Maritime Subsidy Board will continue to maintain an open mind in the consideration of your Petition for Reconsideration, when supplemented, and whatever action the Board/Acting Maritime Administrator may take in respect thereto *will be set forth in a formal opinion ("A" Series), with discussion and explanation of the rea-*

son for the conclusions reached by the Board/Acting Maritime Administrator" (Emphasis added).

b. **Recourse from the Board action of April 11, 1968, and/or its determination on the presently pending "reconsideration" thereof.**

The very letter of notice of the action taken by the Board, dated April 12, 1968 (certified copy of which accompanies this affidavit under separate cover), referred to the parties' rights to petition for review of the action by the Secretary of Commerce pursuant to Department of Commerce Order 117-A, as amended, Sec. 6.02 (31 F.R. 8067, June 8, 1966).

On April 22, 1968, plaintiffs' counsel petitioned the Board for "reconsideration" of the action of April 11, 1968, and by letter dated April 23, 1968, such petition was granted. Additionally, plaintiffs' counsel addressed a letter to the Secretary of Commerce on April 22, 1968, to insure the correctness of their understanding that the grant of "reconsideration" by the Board tolled the period in which to seek review by the Secretary of Commerce. By the afore-mentioned letter of April 23, 1968, their understanding was confirmed.

In sum, the plaintiffs are currently assured of their right to petition the Secretary of Commerce regarding the original action of the Board on April 11, 1968, and/or the decision issued as a result of the pending "reconsideration" by the Board on the question of fair and reasonable "meaning" for certain newly constructed subsidized vessels.

c. **Contract Article I-4, Regarding Subsidy Rates; the Implementing Regulations, i.e., "Manual of General Procedure for Determining Operating-Differential Subsidy Rates"; and Contract Article I-5, Regarding Revision of Rates, with Reference to Section 606(1). Merchant Marine Act, 1936, as Amended.**

(1) Article I-4 of the subsidy contract reads, in pertinent part:

"In order to place the proposed operations of the vessels named in this agreement on a parity with those of foreign competitors, and subject to all the terms of this agreement . . . , the United States shall, pursuant to Section 603(b) of the Act, pay to the Operator, as operating-differential subsidy, sums equal to the excess of the *fair and reasonable cost (as determined by the Board) of . . . wages and subsistence of officers and crews . . .*" (Emphasis added).

(2) The "Manual of General Procedures for Determining Operating-Differential Subsidy Rates," approved November 25, 1957, points out in its statements of legal basis and preface:

"In other words, operating-differential subsidy rates represent the percentage by which the fair and reasonable costs to a U.S. operator of operating a U.S. flag vessel with a U.S. crew exceed the estimated fair and reasonable cost to a foreign operator of operating the same vessel with a foreign crew under the registries of the substantially competitive foreign countries." (p. ii)

"In preparation of this Manual, the . . . (Board) has been governed by the provisions of the Merchant Marine Act, 1936, as amended, in determining 'fair and reasonable' estimates of cost." (p. iii)

(3) "Manning" scales on subsidized vessesl are factors within the determination of operating-differential subsidy "wage" rates. Such rates are determined by the Board on an annual basis, in accordance with the provisions of the "Manual" and as arranged with the plaintiffs. Each of the plaintiffs will have opportunity, if they so elect, for a statutory hearing under Section 606(1), Merchant Marine Act, 1936, as amended. Such hearings usually are held before a Hearing Examiner, with a recommended decision to the Board. The hearings are conducted according to the Board's rules of practice and procedure (General Order 41, 3d Rev.),

which afford all of the protections of the Administrative Procedure Act. If plaintiffs are unsatisfied with the recommended decision of the Hearing Examiner, said rules permit the directing of exceptions to, and permit the chance for further argument before, the Board. Thereafter, on timely application, opportunity to petition the Board for "reconsideration" of its decision exists.

Upon issuance of the final decision of the Board, the plaintiffs may petition the Secretary of Commerce for review of said final Board decision, according to the terms of Department of Commerce Order 117-A, Sec. 6.01 (31 F.R. 8087, June 8 1966).

Thereafter, judicial review is possible before the United States Court of Claims.

/s/ John M. O'Connell
John M. O'Connell

[Jurat dated June 24, 1968.]

GOVERNMENT EXHIBIT B

April 22, 1968

The Honorable C. R. Smith
Secretary of Commerce
Washington, D.C.

In re: Maritime Administration Disallowance of Subsidy on Positions Aboard West Coast C-4 Vessels.

Dear Sir:

I enclose a self-explanatory copy of a petition for reconsideration of a decision of April 11, 1968, which I have today filed with the Maritime Administration on behalf of American Mail Line Ltd., American President Lines, Ltd. and Pacific Far East Line, Inc. I believe that petition suffi-

cient to toll the 10-day period within which a petition for review by the Secretary must be filed. The magnitude of the issue dictates, however, the maximum of caution. I accordingly request, if this should be necessary, that the time within which a petition for review by the Secretary may be filed be extended so that the 10-day period begins to run upon the Board's final action on the enclosed petition for reconsideration.

Sincerely yours,

/s/ Warner W. Gardner

Warner W. Gardner
Attorney for American Mail Line Ltd.,
American President Lines, Ltd. and
Pacific Far East Line, Inc.

cc: Secretary
Maritime Administration

GOVERNMENT EXHIBIT B(1)

Before the

MARITIME SUBSIDY BOARD/
ACTING MARITIME ADMINISTRATOR

In re: Manning Disallowances,
West Coast C-4 Vessels

PETITION FOR RECONSIDERATION

American Mail Line Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc. request reconsideration of the decision of the Board and Acting Maritime Administrator of April 11, 1968, of which we were advised by letter of April 12, 1968, which disallowed for all subsidy and recapture purposes 8 positions on each of 9 ships operated by

these operators, as well as on each of 6 ships operated by States Steamship Company, effective as of the date of entry into service; it also disallowed part of the base wages of two positions on the 4 vessels of APL and PFEL (as well as one position on the 6 vessels of States).

The decision is of first importance to those lines and would eliminate about $3.4 million of accrued subsidy for these three petitioners with several times that amount involved for future years.

We do not have in hand the exact submissions made by the petitioners pursuant to Circular Letter No. 17-61, effective as to ships which entered service in 1962 or later, but understand that they consisted only of the manning scale itself, which is all that is called for by C.L. 17-61. There has never been any comprehensive or integrated presentation to the Board or Administration of the many reasons why the disallowed positions should be viewed as eligible for subsidy participation.

The decision was entered without notice to the operators and without opportunity for them to present their case.[1] We hereby ask such an opportunity.

We wish to present our case with as full a documentation as possible. We should hope that such a presentation would be persuasive to the Board and the Acting Administrator. Even if it were not, it would serve to crystallize the issues and the decision in a manner which would surely be helpful to all concerned. We should suppose the Board obliged,

[1] The Office of Government Aid distributed to the industry members of the Joint Industry/Maritime Administration Committee on Subsidy Simplification copies of minutes of the meeting of December 6, 1967, to which was attached a tabulation which indicated that these and other positions were "under consideration by staff;" as explained in the minutes, the tabulation was of vessels as to which the Board "has yet to make manning determinations." We do not suppose that it will be argued that this tabulation, casually supplied to an industry committee, amounts to notice of a potential disallowance for stated reasons and a call for the submission of the operator's case in opposition to those reasons.

before its ruling became final, to consider the case for the operators even in respect of a trivial matter. It seems to us unthinkable that it should refuse to do so in a matter of this consequence.

We ask leave, accordingly, to supplement this petition with a full presentation of the facts and the arguments which show the April 11 decision to be wrong, with such presentation to be made on or before June 17, 1968.[2] We request, too, that the Secretary of the Administration advise us as soon as may be feasible whether this procedure is agreeable.

Respectfully submitted,

/s/ Warner W. Gardner

WARNER W. GARDNER
ROBERT T. BASSECHES

Attorneys for American Mail Line Ltd.,
American President Lines, Ltd. and
Pacific Far East Line, Inc.

SHEA & GARDNER

Of Counsel

April 22, 1968

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[2]The time, 60 days from the receipt of advice of the disallowance, is longer than we should like, but existing commitments of this firm preclude intensive work before mid-May while the magnitude of the issue requires the most careful work possible.

GOVERNMENT EXHIBIT C

Lillick, McHose, Wheat,
Adams & Charles
311 California Street
San Francisco, California 94104

Shea & Gardner
734 - 15th Street, N.W.
Washington, D.C. 20005

May 7, 1968

Mr. James S. Dawson, Jr.
Maritime Subsidy Board
Maritime Administration
Room 3041
General Accounting Office Building
Washington, D.C. 20235

Dear Mr. Dawson:

On May 6 we met with you and Messrs. Aptaker and Ritt to discuss informally our requests for information relating to the West Coast C-4 manning disallowances.

One request was for a statement of the basis of the Board's April 11 disallowances, and for a summary or statement of the evidence considered by the Board in taking that action. We believe it was agreed by all of us that such a statement would be helpful in lending focus to any presentation which the operators will make to the Board pursuant to the Board's grant of our request for reconsideration. We understand, of course, that the Board itself must decide this matter. We understand that you will raise this matter promptly with the Board.

In the balance of our discussion we reviewed with you various requests for information respecting manning which we believe to be available to the Maritime Administration, and to which we would like access in order to make what we would consider to be a meaningful presentation on reconsideration of the manning disallowances. Much of the material which we are seeking is of an historical nature. It is obvious that the disallowances both in principles and in terms of economics represent a matter of consequence. We

accordingly believe it important both to the Board and to the operators that all relevant considerations be developed as fully as possible.

In our meeting of yesterday, we undertook to prepare a memorandum indicating in as much detail as feasible the items of information to which we would like access. A copy of that memorandum is attached hereto.

We appreciate the opportunity to discuss our requests with you. The date of June 17 is pressing heavily upon us, and we accordingly would also appreciate your early advices as to the availability of and accessibility to the requested information.

Sincerely,

James L. Adams

/s/ James L. Adams

Warner W. Gardner

/s/ Warner W. Gardner

cc: EAptaker

May 7, 1968

Memorandum of Requested Information
Respecting West Coast C-4
Manning Disallowance

1. Transcripts or if none any summary or report of proceedings of the U.S. Maritime Commission under Title III, Merchant Marine Act, 1936, held in 1937 and resulting in General Order 15.

2. Transcripts or if none any summary or report of proceedings believed to have been held in July 1940 respecting manning, conducted either by the U.S. Maritime Commission pursuant to Title III, or by the Maritime Labor Board created by a 1938 amendment to the 1936 Act.

3. Studies conducted by the Maritime Labor Relations Division of the War Shipping Administration concerning wages,

hours and working conditions, and manning requirements pertaining to various ratings aboard merchant vessels (as prescribed by various collective bargaining agreements) to which steamship companies which acted as general agents in the operation of the WSA vessels were parties, including any regulations such as Operations Regulations or directives issued by WSA with reference to manning of vessels operated under GAA during and immediately after World War II.

4. Any summary or report resulting from the operating differential subsidy manning hearings conducted as to individual operators and believed to have been held in 1951 and in 1956.

5. Manning lists for vessel types (for example, Victory, C2, C3 and C4 ships) operated under general agency from 1950 to date, identifying rating by rating manning of ships operated by West Coast, by East Coast and Gulf Coast carriers. General types of vessels should if possible be further separated to identify any characteristics which would result in differences in manning.

6. To the extent not covered by the request in the preceding paragraph 5, manning scales prescribed or approved by the Federal Maritime Board for West Coast, for East Coast and for Gulf Coast carriers for the operation of the 35 Mariner vessels constructed by the Federal Maritime Board in the early 1950's and subsequently placed under general agency operation by private operators: (a) during the six month guarantee period following construction and delivery of such ships, and (b) during any extended operations under GAA beyond the 6 month guarantee period. Information should include notification thereof given steamship companies acting as general agents in the operation of such ships.

7. As to the vessels identified in the preceding paragraph 6 hereof, a statement of the size of the crew for which quarters were originally designed and constructed and a statement of any subsequent changes in such crew quarters made therein by the Federal Maritime Board, or by private owners

with construction-differential subsidy. As to any changes identify by name of ship, by date and give the nature of the changes.

GOVERNMENT EXHIBIT E

May 24, 1968

James W. Gulick, Esq.
Acting Maritime Administrator
Maritime Administration
Department of Commerce
Washington, D.C.

In re: May 21, 1968, Application to Inspect Records

Dear Sir:

On April 11, 1968, the Board and Acting Administrator disallowed for all subsidy purposes 8 positions on each of nine C-4 vessels operated by American Mail Line Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc. (hereafter called "the applicants"). On April 23, 1968, the Board and Acting Administrator advised that it would reconsider this disallowance (on the basis of our submission to be made by June 17, 1968). On May 16, 1968, the Board and Acting Administrator denied the request of counsel for the applicants and for States Steamship Company for a statement of the reasons for this disallowance and a summary of the evidence upon which it was based. On May 21, 1968, the applicants filed on Form CD-244, under General Order 99, an application for copies of any memorandum or recommendation considered by the Board/Acting Administrator in making that disallowance, and copies of the "existing evidence on hand and as furnished by the operators," or in lieu thereof a statement of the reasons for such determination by the Board/Acting Administrator and a summary of the evidence before them.

We view the practical likelihood of any grant of our G.O. 99 application to be foreclosed by the May 16 action of

the Board/Acting Administrator. G.O. 99 in § 330.32(h) seems to call for a request for review of any such denial. We have considerable doubt, in view of the May 16 action, that such a request for review is necessary before any proceedings in a district court under 5 U.S.C. § 552(a)(3). To err on the side of caution, we hereby make anticipatory request for review of the denial of our G.O. 99 application, and ask that it be considered at the same time as that application (or if that application should already have been considered, then upon receipt of this request). We enclose a replica of the CD-244 Form filed on May 21, 1968, with Part III appropriately completed.

1. *Specific Documents.* Inspection of the April 11, 1968, minutes of the Board/Administrator indicates that the memoranda on which the Board relied, and the recommendations of which it adopted, were dated November 26, 1965, as revised December 20, 1967.

2. *Reasons for Grant of Application.* Our simple and compelling reason is that we are preparing material in support of reconsideration of the April 11 disallowance and yet are denied advice as to the grounds of that decision. This offends all standards of fairness and orderly procedure with which we are acquainted, and equally offends the Public Disclosure Act of July 4, 1966.

There can be no secret or confidential information disclosed by those memoranda. The only conceivable ground for making us proceed in the dark[1] is the policy of the

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[1] We are not here arguing the merits of that disallowance. But our perplexity and our imperative need to know why the disallowance was made may be illustrated: (a) If 58 is excessive manning for the C-4 vessels, why is it not excessive for the C-4 vessels formerly owned by the Government and as to which a 58-man crew was approved both for Government and for subsequent private operation? (b) If the manning on these vessels is excessive, why is there not comparable improvidence in the manning scales of the MSTS-owned vessels operated by the Government and in the Government-owned ships operated under GAA arrangements? (c) Did the Board consider or ignore the collective bargaining agreements which fixed these crew sizes? (d) Did

Board/Administrator to keep secret all internal memoranda. We need not here consider the merits of that general policy. But it surely cannot be applied to make secret the reasons for the Board's action in a case such as this, where some $3.4 million of subsidy long since accrued is taken from the operators. Our request, in lieu of the actual documents, for a statement of the reasons and a summary of the evidence would permit the Board if it so chose to shield from public view any mistaken or indiscreet statements in those memoranda so long as they were not in fact relied upon by the Board in reaching its decision. We believe we are entitled to the actual documents, but make the "in lieu" request in order to permit us to get on with our business.

3. *Time Requirements.* We want if possible to meet the date of June 17, 1968, on which to submit our case for reconsideration. We want that request to be a meaningful one, which addresses itself to the grounds for this disallowance. That means that we are under the severest pressures of time. We accordingly request the promptest possible action upon our G.O. 99 application and upon this anticipatory request for review.

Sincerely yours,

/s/ Warner W. Gardner

Warner W. Gardner
Attorney for American Mail Line Ltd.,
American President Lines, Ltd. and
Pacific Far East Line, Inc.

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it consider or ignore the union organization and resulting work rules which have traditionally resulted in larger West Coast than East Coast crews?

GOVERNMENT EXHIBIT F

June 7, 1968

Mr. James S. Dawson, Jr.
Maritime Subsidy Board
Maritime Administration
General Accounting Office Building
Room 3041
441 G Street, N.W.
Washington, D.C.

RE: West Coast C-4 Manning

Dear Mr. Dawson:

On April 22, 1968 American Mail Line Ltd., American President Lines, Ltd. and Pacific Far East Line, Inc. requested that the Board/Acting Administrator reconsider its April 11, 1968 action disallowing for all subsidy purposes certain ratings on designated C-4 vessels. States Steamship Company has filed a similar request. The operators have asked the opportunity to submit by June 17, 1968 information and argument in support of their request for reconsideration. By letter of April 23, 1968 you advised that such reconsideration would be granted.

I hereby request that the date within which the lines' supplemental presentation is required to be submitted be extended to July 17, 1968.

1. By memorandum accompanying a letter of May 7, we sought access to a variety of historical information in the files of the Maritime Administration, primarily records of adjudicatory proceedings. That information was first made available to us for inspection on June 3. I want to make clear that I am not in any way criticising this delay. To the contrary the job of locating the records, many of which extended back 30 years, was undoubtedly a substantial one and we appreciate the thorough and cooperative manner in which the documents were first located and then made available to us. Nevertheless, the time available between June 3,

when we first obtained access to the documents, and June 17, the present date scheduled for our submission, is simply insufficient for full review and utilization of these extensive records.

2. Entirely independent of the questions of access to the data referred to above, we find ourselves unable to prepare and meaningfully present our case by June 17.

We accordingly request an extension to July 17 to supplement our petition for reconsideration. Counsel for States Steamship Company have authorized me to state that they similarly request such an extension.

Sincerely,

/s/ Robert T. Basseches

Robert T. Basseches

RTB/nlb

GOVERNMENT EXHIBIT G

June 18, 1968

Mr. James S. Dawson, Jr.
Secretary
Maritime Subsidy Board
Maritime Administration
Room 3041
General Accounting Office Building
Washington, D.C. 20235

RE: West Coast Manning Disallowance

Dear Sir:

This is to confirm our telephone conversation of yesterday, although subsequent events may have made it academic. I had indicated to Daniel Dodell, Esq., of the United States Attorney's office, that I would be able to give him some

more time to respond to our motion for preliminary injunction in D.C. Civ. No. 1347-68, and to indulge his preference for proceeding on motion for summary judgment, if the Maritime Administration would in turn extend the time within which our papers upon reconsideration were due until a date two weeks after the decision of the court. You indicated that such an arrangement would be acceptable.

It subsequently developed that there would be difficulty in obtaining an assured date for argument of the motions in mid-July, when only one motions court would be in session. Mr. Dodell and I accordingly agreed that he could have until June 26 to reply to our motion, and could at that time file his own motion to dismiss or for summary judgment, and that the respective motions would be argued on June 27. The Motions Clerk of the District Court has agreed to this schedule. Except as the District Judge should take the matter under advisement, this schedule should not interfere with the present date of July 17 fixed for our presentation upon reconsideration. If the Court should not, however, have decided the matter by July 3, I should at that time request that our due date (and that of Mr. Adams for State Steamship Company) be extended until a date two weeks after the Court's decision.

Sincerely yours,

/s/ Warner W. Gardner

Warner W. Gardner

cc: Daniel Dodell, Esq.
James L. Adams, Esq.

GOVERNMENT EXHIBIT H

April 23, 1968

Warner W. Gardner, Esq.
Shea and Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Gardner:

Re: Manning Disallowances
West Coast C-4 Vessels

Your Petition for Reconsideration on behalf of American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc., of the decision of the Maritime Subsidy Board/Acting Maritime Administrator of April 11, 1968, in respect to which the affected operators were advised by letter of April 12, 1968, was received on April 22, 1968, and in keeping with the rules prescribed by the Board is considered "a timely Petition for Reconsideration."

In further reference to this subject, note has been made of your letter of April 22, 1968, addressed to the Secretary of Commerce, wherein you express the belief that your Petition for Reconsideration will automatically toll the 10-day period within which time a request for review by the Secretary must be filed. In addition, you request that, should it be necessary to do so, the time within which a Petition for Review by the Secretary may be filed be extended so that the 10-day period begins to run upon the Board's final action on the subject Petition.

Please be assured that an "extension of time" is not necessary. Your attention is invited to Section 6.03 of D. O. 117-A, wherein it is indicated that if a timely Petition for Reconsideration is filed the time for filing a petition or request for review by the Secretary will run from the date of the Board's action finally disposing of the issues presented by the Petition for Reconsideration (Part 202 of Title 46 of the Code of Federal Regulations, 32 F.R. 2705-2706, February 9, 1967).

Your Petition for Reconsideration will be carefully considered by the Maritime Subsidy Board/Acting Maritime Administrator and you will be advised as soon as a decision is reached on this matter.

Sincerely yours,

/s/ James S. Dawson, Jr.,
Secretary
Maritime Subsidy Board/
Maritime Administration

cc: Secretary of Commerce
General Counsel
Executive Secretariat (2)

GOVERNMENT EXHIBIT I

MAY 16 1968

Warner W. Gardner, Esq.
Shea and Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Gardner:

Re: Manning Disallowances
West Coast C-4 Vessels

Reference is made to the Secretary's letter of April 23, 1968, addressed to you in respect to the subject as above, wherein you were advised that your Petition for Reconsideration will be carefully considered by the Maritime Subsidy Board/Acting Maritime Administrator.

Subsequent thereto, on April 29, 1968, you submitted a "Motion for Stay of Accounting Direction" on behalf of American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc., requesting the Acting Maritime Administrator to stay or suspend the April 18, 1968 direction of the Pacific Coast District Finance Officer that subsidy on wages and subsistence for eight ratings on each

of nine vessels (plus another six vessels of States Steamship Company) be deducted from the next subsidy vouchers: for 1968, from the next quarterly voucher and for 1967 and prior years from the next 95% voucher covering audited claims.

Since that time, and under a misunderstanding of the effect of the Secretary's letter of April 23, 1968, indicating that the Petitions for Reconsideration would be carefully considered, Mr. Logan issued on May 2, 1968, a letter to States, AML, APL and PFEL, in which he advised that the action requested in his letter of April 18, 1968, "is hereby withdrawn pending a final determination by the Board of the basic question at issue." In view of these circumstances, the Maritime Subsidy Board and the Acting Maritime Administrator, at a meeting held on May 14, 1968, decided that it would be impractical to countermand Mr. Logan's withdrawal of his "accounting direction" and further decided to stay the April 11, 1968, actions until the date on which the Board and Acting Maritime Administrator act upon the Petitions for Reconsideration.

In addition, please be advised that the Board and the Acting Maritime Administrator have been apprised of the meeting held on May 6, 1968, by representatives of the West Coast operators with representatives of the Maritime Administration staff, following which two specific requests were made, as formalized in a letter dated May 7, 1968, and restated as follows:

1. A statement of the basis of the Board/Acting Administrator's April 11 disallowance and a summary or statement of the evidence considered in taking these actions.

2. Information respecting manning which may be available from the Maritime Administration and to which access is desired in order to make a meaningful presentation on reconsideration of the manning disallowances.

At the May 14 meeting, as previously referenced, the Board and the Acting Maritime Administrator denied Request No. 1 above, and, in respect to Request No. 2 above, determined

to make every reasonable effort to locate the information requested and make such information available as may properly be made available in keeping with applicable laws, rules and regulations on the subject.

Sincerely yours,

/s/ John M. O'Connell

John M. O'Connell
Assistant Secretary

cc: James L. Adams, Esq.
Thomas E. Kimball, Esq.

GOVERNMENT EXHIBIT J

May 29, 1968

Warner W. Gardner, Esq.
Shea and Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Gardner:

Re: May 21, 1968, Application to Inspect Records

Reference is made to your letter of May 24, 1968, addressed to the Acting Maritime Administrator regarding the above subject.

Your May 21, 1968, application on Form CD-244 under General Order 99 was received by the Public Information Office on that date and a duplicate thereof received by the Secretary to the Acting Administrator on May 24, 1968. The duplicate application of May 24 has been answered and this letter will confirm the fact that the answer applies also to your original application of May 21.

You are well aware of the fact that it is not our practice to disclose internal memoranda. Our letter of May 8, 1968, addressed to you and your colleagues, Mr. Kominers, dis-

cusses that subject in reference to O.G.A. Determination No. 14. From our point of view the same principles apply to this instance. For a more formal discourse on the general subject, your attention is invited to the ruling of the Board in Docket CA-42, copy of which is enclosed for your convenient reference.

Returning now to the decision of the Board/Acting Administrator of April 11, 1968, disallowing for all subsidy purposes eight positions on each of nine C4 vessels operated by your clients, we have just completed an exhaustive search for a variety of records and documents which you and Mr. Adams (on behalf of States Steamship Company) previously requested. They will be made available for review by your designees at a convenient time and location, in order that we may be advised as to what material, if any, you wish to have duplicated for your use in supplementing your Petition for Reconsideration. By previous commitment, the same material will be made available in similar manner to attorneys representing Gulf and South American Steamship Company, Inc. In keeping with established practice, the standard user fees will be applied for this service.

Please rest assured that the Acting Administrator and Members of the Maritime Subsidy Board will continue to maintain an open mind in the consideration of your Petition for Reconsideration, when supplemented, and whatever action the Board/Acting Administrator may take in respect thereto will be set forth in a formal opinion ("A" Series), with discussion and explanation of the reason for the conclusions reached by the Board/Acting Administrator.

Sincerely yours,

/s/ James S. Dawson, Jr.

James S. Dawson, Jr.
Secretary

GOVERNMENT EXHIBIT K

Warner W. Gardner, Esq. May 29, 1968
Shea and Gardner
734 Fifteenth Street, N.W.
Washington, D. C. 20005

Thomas E. Kimball, Esq.
Lillick, McHose, Wheat, Adam & Charles
1625 K Street, N.W.
Washington, D. C. 20006

T. S. L. Perlman, Esq.
Kominers, Fort, Schlefer, Farmer & Boyer
1401 K Street, N.W.
Washington, D. C. 20005

Gentlemen:

Re: Manning Disallowances.

Reference is made to various letters, discussions and responses between your respective firms and this Office during the months of April and May, 1968, requesting information and records in connection with manning disallowances affecting your various clients. Reference is also made to Mr. Gardner's supplemental request of May 7, 1968, adding to the list of desired data the transcripts of Docket No. S-8, copy of exhibits and briefs submitted and copy of the recommended decision.

Referring specifically to the latter communication, we have available the transcripts of the preceedings in Docket No. S-8 with respect to minimum wage, minimum manning, and reasonable working conditions on subsidized vessels. This includes 5 bound volumes, briefs and exhibits as well as a copy of the recommended decision to which they refer, consisting of an estimated 1 1/2 cartons of material.

With respect to your overrall request, we have researched all of our files, the Archives, storage facilities and such other sources as considered appropriate to collate as much of the requested material as could be located. For your informa-

tion, we comment below on such of the separate requested items listed or referred to in the above requests.

With respect to the memorandum of requested information attached to the letter of May 7, 1968, submitted by Messrs. Adams and Gardner, the following material and data is available for inspection, listed in the numerical sequence requested:

1. Transcripts of the proceedings of the U.S. Maritime Commission under Title III, Merchant Marine Act, 1936, held in 1937 and resulting in General Order No. 15, as well as a copy of General Order No. 15 and the manning and wage supplements referred to therein. These items constitute approximately 1 carton.

2. Transcript of proceedings of the U.S. Maritime Commission, under Title III, Merchant Marine Act, 1936, held in 1940, and exhibits, comprising, in toto, approximately 1 carton.

3. One-half carton of material reflecting studies conducted by the War Shipping Administration concerning wages, hours and working conditions and manning requirements pertaining to various ratings aboard merchant vessels (as prescribed by various collective bargaining agreements) to which General Agents involved in the operation of WSA vessels were parties including operation regulations issued by WSA. Included in this package is also a pamphlet entitled "Wage and Manning Scales on Vessels of the War Shipping Administration, May 1, 1946".

4. We have been unable to locate or identify the manning hearings believed to have been held in 1951. With respect to the hearings in 1956, these, you will recall, were held by Federal Maritime Board Member Guill who, at the beginning of each session, advised the participants that these hearings were being held on a strictly informal basis and would not be recorded. However, notes were taken by a staff assistant at each of these hearings, a compendium of which is available.

5. Manning lists have been developed and are available covering vessel types (Victory C2, C3, etc.) for each company operating under General Agency from 1950 to date, identifying, rating by rating, manning on ships operated by West Coast, East Coast, and Gulf Coast carriers.

6. The manning scales for the 35 mariner vessels operated under General Agency are included in the data referred to in Item 5, above.

7. With respect to the 35 mariner vessels, there has been compiled and is available a statement of the size of crew for which quarters were originally designed and constructed (the original C4-S-1a type) and a statement of subsequent changes in such crew quarters for the modified carrier (C4-S-1h type).

The foregoing material has been drawn from Agency files, Archives, records center and various storage facilities. In almost every instance it constitutes the only official Government record available. It must be perused and copied with great care to avoid loss or mutilation.

The material will be made available upon request to the undersigned or his Assistant and thereafter examined in Room 3251 A. None of the material may be removed from Room 3251 A. It may be duplicated on the spot by you at your expense or by us at twenty-five cents per page. When the project is completed we will render a bill in keeping with established user fees for the services yet to be performed as well as services (records search) already performed.

Sincerely yours,

/s/ James S. Dawson, Jr.

James S. Dawson, Jr.
Secretary

GOVERNMENT EXHIBIT L

June 10, 1968

Robert T. Basseches, Esq.
Shea and Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Basseches:

In keeping with your request I am enclosing Table D, entitled, "Manning and Related Monthly Based Wages for Mariner Ships" and Table V, "Operating HIstory of Mariner Ships," which set forth the manning scales applicable to the Mariner vessels constructed by the Government and employed under General Agency Agreement Contracts during the Korean conflict, which pertained from date of delivery until lay-up or sale to commercial operators.

I have discussed this matter with Mr. Allen and Mr. Ritt, who, in turn, inform me that the attachments represent the only available information in which you are interested on this subject.

Sincerely yours,

/s/ James S. Dawson, Jr.

James S. Dawson, Jr.
Secretary

cc: Thomas E. Kimball, Esq.
T. S. L. Perlman, Esq.

GOVERNMENT EXHIBIT M

June 11, 1968

Robert T. Basseches, Esq.
Shea and Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dear Mr. Basseches:

Re: West Coast C-4 Manning

Your letter of June 7, 1968, requesting an extension from June 17 to July 17, 1968, in which to supplement your Petition for Reconsideration of the Board/Acting Administrator's actions of April 11, 1968, disallowing for all subsidy purposes certain ratings on designated C-4 vessels, has, this date, been granted by the Maritime Subsidy Board.

By copy of this letter Counsel for States Steamship Company is also being advised of the extension of time to July 17 in which to supplement their Petition for Reconsideration.

Sincerely yours,

/s/ John M. O'Connell

John M. O'Connell
Assistant Secretary

cc: Thomas E. Kimball, Esq.
James L. Adams, Esq.

X

JA 65

GOVERNMENT EXHIBIT N

April 11, 1968

* * *

States SS Co., Pacific Far East Line, Inc., American Mail Line, Ltd., and American President Lines, Ltd. - Manning Scales - New Conventional C4 Design Type Vessels.

The Maritime Subsidy Board considered memorandum dated November 26, 1965, revised December 20, 1967, recommending that the Board approve for subsidy purposes manning scales for the conventional C4 design type vessels operated by States Steamship Company, Pacific Far East Line, Inc., American Mail Line, Ltd., and American President Lines, Ltd.

After discussion, upon the "yea" vote of Chairman Gulick, Member Davis and Alternate Member Dawson, the Maritime Subsidy Board found and determined with respect to each of the C4 conventional type vessels and operators, as indicated below, that, effective with the date each vessel entered into the subsidized service:

(Quote Recommendations I thru IV, pages 27 thru 30)

Thereafter, Chairman Gulick announced that in his capacity as Acting Maritime Administrator he had found and determined that:

(Quote Recommendation V, pages 30 and 31)

Copy of the foregoing memorandum and other pertinent documents are in the files of the Secretary.

quoted in April 12th letter as pts I - V

Government Exhibit O

May 14, 1968

* * *

Manning Scales - New Conventional C4 Design Type Vessels (States, PFEL, AML and APL - MSB action of 4/11/68) - Petitions for Reconsideration, Stay of Board Order, Request for Explanatory Statement and Access to Various Records.

The Board considered and discussed various letters and documents received from attorneys representing States Steamship Company, Pacific Far East Line, Inc., American Mail Line Ltd., and American President Lines, Ltd., which were received subsequent to the Board's action of April 11, 1968, as set forth in a letter dated April 12, 1968, to the affected operators approving for subsidy payment and subsidy ratemaking purposes, subject to certain stated disallowances, manning scales for the new conventional C4 design type vessels operated by the respective steamship companies.

The letters and documents referred to above are identified below, as follows:

1. Letter dated April 22, 1968, to the Secretary of Commerce enclosing a Petition for Reconsideration addressed to the Maritime Subsidy Board/Acting Maritime Administrator by Mr. Warner W. Gardner, Attorney for American Mail Line Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc.

2. Letter addressed to the Secretary of Commerce on April 22, 1968, with a Petition for Reopening addressed to the Maritime Subsidy Board and the Maritime Administration by Mr. James L. Adams and Mr. Thomas E. Kimball, Attorneys for States Steamship Company.

3. Two letters dated April 23, 1968, to Mr. Gardner and Mr. Kimball, respectively, by the Secretary, Maritime Subsidy Board/Maritime Administration, in each of which it was, among other things, stated, "Your Petition for Reconsideration will be carefully considered by the Maritime Subisdy

Record/Acting Maritime Administrator and you will be advised as soon as a decision is reached on this matter."

4. Letter dated April 26, 1968, from Mr. Thomas E. Kimball, Attorney for States Steamship Company, requesting "that the Board take action staying its decision of April 11, 1968, until such time as the issues raised by States' Petition for Reopening have been finally disposed of."

5. Motion for Stay of Accounting Direction submitted April 29, 1968, by Mr. Warner W. Gardner, Attorney for AML, APL and PFEL, requesting the Acting Maritime Administrator to stay or suspend the April 18, 1968 direction of the Pacific Coast District Finance Officer respecting subsidy on wages and subsistence and the submission of quarterly subsidy vouchers.

6. Letter dated May 7, 1968 submitted by Messrs. Adams and Gardner, Attorneys on behalf of States, AML, APL and PFEL, requesting (a) a statement of the basis of the Board's April 11 disallowances and a summary or statement of the evidence considered by the Board in taking that action, and (b) information respecting manning which may be available from the Maritime Administration and to which access is desired in order to make meaningful presentation on reconsideration of the manning disallowances.

7. Letter addressed to the West Coast operators under date of April 18, 1968, by Mr. W. G. Logan, District Finance Officer, requesting that the effect of the Board/Acting Maritime Administrator's decision of April 11, 1968, on subsidy claims previously submitted or currently to be submitted be reflected in the operators' next quarterly vouchers.

8. Letter addressed by Mr. Logan on May 2, 1968, to the West Coast operators withdrawing the action requested in his letter of April 18, 1968, pending a final determination by the Board of the basic question at issue.

After discussion, upon the "yea" vote of Chairman Gulick, who announced that he was voting in his deal capacity as

Chairman and Acting Maritime Administrator, and upon the "yea" vote of Member Davis and Alternate Member Dawson, the Maritime Subsidy Board and the Acting Maritime Administrator took the following actions:

1. Determined that since Mr. Logan's letter of May 2, 1968, was issued under a misunderstanding of the effect of the Secretary's letter of April 23, 1968, indicating that the Petitions for Reconsideration would be carefully considered, it would be impractical to countermand Mr. Logan's withdrawal of his "accounting direction" of April 18, 1968, and under these circumstances decided to stay the April 11, 1968 actions until the date on which the Board acts upon the Petitions for Reconsideration.

2. Denied the request for a statement of the basis of the Board's April 11 disallowances and a summary or statement of the evidence considered by the Board/Acting Maritime Administrator in taking that action.

3. Determined to make every reasonable effort to locate the information respecting manning as requested in the letter of May 7, 1968, submitted by Messrs. Adams and Gardner on behalf of the steamship companies and make such information available as may properly be made available in keeping with applicable laws, rules and regulations on the subject.

4. Directed the Assistant Secretary to send appropriate letters of advice to Messrs. Adams and Gardner with respect to the foregoing actions of the Board/Acting Administrator.

Copies of the letters and documents referred to above are in the files of the Secretary.

Thereupon, by the "yea" vote of Chairman Gulick, Member Davis and Alternate Member Dawson, the meeting was adjourned at 4:20 P.M.

A true record.

/s/ John M. O'Connell
Assistant Secretary

CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs move, alternatively to their pending motion for preliminary injunction, for summary judgment granting them the relief prayed in their complaint.

Plaintiffs accept paragraphs 2-9 of defendants' "Statement of Mutual Facts" and paragraphs 1-3 of the supporting affidavit of John M. O'Connel. The paragraphs not thereby accepted contain no misstatement of fact known to us, but do recite the content of the Board's files not known to us and do advance conclusions and argument with which we do not agree. The Government Exhibits B-O are accurate. There is no dispute of material fact.

The grounds of this cross-motion for summary judgment are the plaintiffs' verified complaint, their memorandum in support of their motion for preliminary injunction, and their reply to defendants' motion for summary judgment.

/s/ Warner W. Gardner
WARNER W. GARDNER
Attorney for Plaintiffs

June 27, 1968

[Filed July 1, 1968.]

ORDER

This matter having come before the Court on cross motions for summary judgment and the Court having considered the memoranda submitted by the parties and heard oral argument,

Wherefore, this 1st day of July, 1968,

IT IS ORDERED that the motion of the plaintiffs is denied and the motion of the defendants is granted.

(Signed) HOWARD F. CORCORAN
JUDGE

NOTICE OF APPEAL

Notice is hereby given that plaintiffs American Mail Line Ltd., American President Lines, Ltd., and Pacific Far East Line, Ltd. hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order of July 1, 1968 entered in this action denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment.

Dated: July 3, 1968

Warner W. Gardner
Robert T. Basseches
David Booth Beers

Attorneys for Plaintiffs

Certificate of Service

July 31, 1968

I hereby certify that I have this day served a copy of the foregoing Appendix to the Briefs upon counsel for appellees, Hon. Edwin L. Weisl, Jr., Assistant Attorney General, John C. Eldridge, Esq. and Leonard Schaitman, Esq. by delivery of said copies to the office of Mr. Weisl.

Warner W. Gardner

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,091

AMERICAN MAIL LINE LTD., *et al.*,

Appellants,

v.

JAMES W. GULICK, *et al.*,

Appellees.

APPEAL FROM ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

WARNER W. GARDNER
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Attorney for Appellants,
American Mail Line Ltd.,
American President Lines, Ltd.
and Pacific Far East Line Inc.

SHEA & GARDNER
Of Counsel

July 31, 1968

Washington, D. C. - THIEL PRESS - 202 - 393-0625

QUESTION PRESENTED

Appellees, the Maritime Subsidy Board and the Acting Maritime Administrator, on April 11, 1968, determined that operating-differential subsidy paid or accrued since 1961 should be disallowed on eight positions on each of nine vessels operated by appellants. Appellants had no notice that the issue was pending before the Board. The disallowance would require a refund of about $3.4 million retroactively, and much more in the future. Appellants were advised of the determination but have been given no reason or ground for that action. The determination was copied from the recommendation, pp. 27-31, of a staff memorandum, which was all that was before the Board when it acted. The Board has agreed to reconsider the determination but has refused prior to action upon reconsideration to make available any reason or ground therefor. The question is whether the Freedom of Information Act, 5 U.S.C. § 552, authorizes access by appellants to the presumably explanatory pp. 1-26 of the memorandum in order to make meaningful request for reconsideration.

This case has not previously come before this Court.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,091

AMERICAN MAIL LINE LTD., *et al.*,

Appellants,

v.

JAMES W. GULICK, *et al.*,

Appellees.

APPEAL FROM ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This case arises on a complaint for an injunction against withholding, and for an order giving access to, documents in possession of the defendants, of which the District Court is given jurisdiction by 5 U.S.C. § 552(a)(3) [App. 2]. This Court has jurisdiction on appeal from the final order of the District Court under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellees, the Maritime Subsidy Board and the Maritime Administrator, pursuant to delegation from the Secretary of Commerce, administer the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. § 1101 *et seq.* Often, as in the matters herein complained of, joint action is taken under the style of "Maritime Subsidy Board/Maritime Administrator." [App. 7] We shall herein usually refer to both appellees as "the Board."

The three appellees operate steamship services pursuant to operating-differential subsidy contracts entered into under the Merchant Marine Act, 1936. Under Section 603(b) of that Act they are paid operating-differential subsidy for the operation of their subsidized vessels which "shall not exceed the excess of the fair and reasonable cost of * * * wages and subsistence of officers and crew" under United States registry over the same costs of their principal competitors operating under foreign registry. Without significant exception the "fair and reasonable cost" of operating U.S.-flag vessels has hitherto been determined on the basis of crew sizes determined by collective bargaining between the operators and the off-shore labor unions [App. 3].

At various times between 1961 and 1965 appellants have constructed and put into subsidized service nine so-called C-4 type vessels. They were manned by a crew of 58 officers and men under collective bargaining agreements with the several unions. Subsidy vouchers have been presented and paid with respect to such 58-man crew at all times since these vessels entered service [App. 3].

On April 11, 1968 (as stated by letter of April 12, 1968), the Maritime Subsidy Board determined with respect to each of these nine vessels that a crew in excess of 50 men "is not fair and reasonable and is not necessary for the efficient and economical operation of the vessels and shall be disallowed for subsidy rate-making and subsidy payment purposes." On the same day the Acting Maritime Administrator determined that the cost of wages and subsistence

incurred for these eight "excess" men "is clearly improvident, unnecessary and excessive for the efficient and economical operation of each of the new conventional Pacific Coast C-4 design vessels and, subject to audit by the Comptroller, shall be disallowed" for all subsidy accounting purposes. The disallowance was effective from the date each vessel entered service. [App. 3, 7] No notice had been given appellants that the issue was under consideration by the Board, and no submission of their case was or could have been made by appellants. No explanation, ground or reason for the determination is suggested in the April 12, 1968, letter advising of the action [App. 3-4].

The minutes of the Board show that this action was taken upon consideration of a "memorandum dated November 26, 1965, revised December 20, 1967, recommending that the Board approve for subsidy purposes manning scales for the conventional C-4 design type vessels" operated by appellants and one other company [App. 65]. The affidavit of the Board's Assistant Secretary states that "The official records before the Board at the aforesaid meeting, insofar as they concern the manning scales of the plaintiffs, consist solely and exclusively of the aforesaid memorandum, including attachments thereto * * *." [App. 37-38] The Board minutes show that the determination of the appellees was made by directing that the recommendations of the staff memorandum, found at pages 27-31, be copied out in *haec verba.*[1]

The retroactive impact of this determination, in terms of subsidy paid and accrued and thus subject to refund is [App. 4]:

---

[1] The relevant text of the minutes is: "After discussion * * * the * * * Board found and determined * * * (Quote Recommendations I thru IV, pages 27 thru 30). Thereafter, * * * Acting Maritime Administrator * * * found and determined that: (Quote Recommendation V, pages 30 and 31)." [App. 65]

Appellant	Vessels		Subsidy to be Refunded
	Number	Date in Service	
American Mail Line	5	1962, 1965	$1,700,000
American President Lines	2	1961	900,000
Pacific Far East Line	2	1962	700,000

Corresponding amounts of subsidy disallowance, evidently about $60,000 per vessel per year, are involved for the future lives of those vessels [App. 4].

On April 22, 1968, appellants requested the Board to reconsider this action, on the basis of facts and arguments to be submitted by June 17, 1968. By letter of April 23, the Secretary of the Board advised that such reconsideration would be granted. [App. 43-45, 55-56] (In consequence of subsequent events, the time for submission has been extended to August 12, 1968.)

Appellants on April 18, 1968, were directed to deduct the amounts of past subsidy involved from their next subsidy vouchers and on April 29, 1968, moved for a stay of that accounting direction. The district finance officer on May 2, 1968, withdrew his direction to refund past subsidy paid or accrued pending the Board's decision upon reconsideration. The Board on May 16, 1968, advised that his action reflected a "misunderstanding of the effect" of the grant of reconsideration, but that "in view of those circumstances * * * it would be impracticable to countermand" the withdrawal of the refund direction, and stayed the effect of its April 11 disallowance pending reconsideration [App. 56-58].

On May 6, 1968, appellants met with ranking staff members of the Maritime Administration and requested, *inter alia* (in view of the consistent refusal of the Board in other proceedings to disclose the staff memoranda which led to their formal determinations), that they be given a statement of the Board's reasons for such disallowance and a summary

of the evidence before the Board. The staff members advised that this was feasible, but that whether this information would be made available was a decision for the Board [App. 5]. By letter of May 7, 1968, appellants made formal request for such a statement or summary [App. 46]. On May 14, 1968 (as advised by letter of May 16, 1968), the Board and Acting Administrator denied that request without explanation [App. 56-58].

Appellants on May 21 and 24, 1968, filed formal request for access to the documents which underlie the April 11 disallowance and an anticipatory petition for review of any refusal [App. 49-51]. By action of May 29, 1968, the Board denied the requested access [App. 58-59].

The Board's letter of May 29, 1968, states that whatever action the Board takes upon appellants' petition for reconsideration will be set forth and explained in a formal opinion [App. 59]. Appellants, however, do not know what matters to develop in their petition for reconsideration, since they do not know the basis for the decision of which they seek reconsideration [App. 5].[2]

Plaintiffs filed suit in the District Court under the Freedom of Information Act, to gain access to the explanatory memorandum, on June 3, 1968 [App. 1-6]. A motion for preliminary injunction was filed on June 7, 1968. Appellees filed a motion for summary judgment on June 26, 1968, and appellants on June 27, 1968, filed a cross-motion for summary judgment [App. 33, 69] and withdrew their motion for preliminary injunction. After argument on June 27, 1968, Judge Corcoran on July 1, 1968, entered judgment for appellees, dismissing the complaint. This order, too, was unexplained [App. 69].

---

[2]We do not claim that we are forced to stand mute. To the contrary we will make a very elaborate presentation. But we do not know how much of this effort is directed to proof of what the Board accepts, nor what grounds of its decision we may not have guessed.

STATUTES INVOLVED

Section 552 of 5 U.S.C. is set out in Appendix A to this brief.

STATEMENT OF POINTS

1. Appellees are obliged, under the fundamentals of civilized government and the purposes of the Freedom of Information Act, to explain why they have taken seriously adverse action against appellants.

2. Appellees are required to make available to appellants the document which explains the basis of their action notwithstanding the exception from the Act of "intra-agency memorandums" because–

> (a) When the concluding recommendations of the staff memorandum were copied off as the order of the Board, it lost its character as an "intra-agency" memorandum and became one with external effect; and
>
> (b) The memorandum would "be available by law" to appellants "in litigation with the agency."

SUMMARY OF ARGUMENT

I

The due process requirements of fundamental fairness would in themselves require that the Board give the reasons for seriously adverse action, so that appellants in seeking reconsideration would know the issues to which to address their case. *Gonzalez v. United States*, 348 U.S. 407 (1955); *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, Frankfurter, J. (1951).

Appellants need not, however, rest upon the Constitution, since the Freedom of Information Act, 5 U.S.C. § 552, was expressly designed, as the President said in signing it, so that "No one should be able to pull the curtains of secrecy

around decisions which can be revealed without injury to the public interest." Since the action disallowing subsidy was plainly, at the least, "instructions to staff that affect a member of the public" and rested upon a specifically identified staff memorandum, disclosure is evidently required by § 552(a) unless the exception of "intra-agency memorandums" found in § 552(b)(5) serves to deflect the plain thrust of the Act.

II

When the Board copies off pages 27-31 of the staff memorandum as its order against appellants, it converted that memorandum into one having external operation. It was no longer an internal staff discussion. No longer would its disclosure fit the reasons for secrecy of internal memoranda which are given in the Committee reports on the Act: disclosure is not "premature," nor before the agency "completes the process of * * * issuing an order." To the contrary, an agency surely cannot be allowed to keep secret the reasons for its action simply because it chooses to act on a staff memorandum rather than writing its own opinion or explanation.

Even if pages 1-26 of the memorandum remain only "intra-agency" after pages 27-31 have been made the order of the Board, it cannot be kept secret under § 552(b)(5) since that memorandum would incontestibly be "available in litigation" with the Board. Subsidy contract issues can be litigated only in the Court of Claims, and that Court has unequivocally ruled that a precisely similar memorandum of the appellee Board must be produced in order to explain the decision when it was placed in litigation. *Pacific Far East Line, Inc. v. United States*, C. Cls. No. 119-63 [App. 26-32]. The Court applies the same rule in litigation generally: internal memoranda necessary to understand the agency's action must be produced. *Richard A. Weiss v. United States*, C. Cls. No. 205-65.

Apart from the Court of Claims, the same rule has been applied by the federal courts with respect to memoranda necessary to explain the actions of the Comptroller of the Currency. *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 403 (E.D. Mich., 1965), aff'd *Bank of Dearborn v. Manufacturers' Nat. Bank of Detroit*, 327 F.2d 496 (CA 6, 1967), or the bases of asserted tax deficiencies, *e.g.*, *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 64-68 (N.D. Ohio, 1964). The case is wholly different when the agency *has* by opinion explained its action, and the litigant seeks in addition to probe the mental processes of the tribunal, *e.g.*, *Morgan v. United States*, 313 U.S. 409 (1941).

We have no reason to believe that a Government official is so timorous that he will not express himself candidly even if the memorandum might someday be disclosed; certainly the rest of the world finds that hazard acceptable. There should, in any case, be no prohibition against disclosure of *all* memoranda lest *one* prove embarrassing; the claim of privilege should be restricted to the case where it would serve a need.

In this case, the Board's concern over "full and frank" staff discussion is demonstrably a contrived argument. It has also refused to supply a statement of its reasons and a summary of the evidence on which it acted (agreed by the staff to be feasible). In these circumstances, it cannot be disputed that what the Board wishes to preserve is not the "full and frank" discussion of its staff but rather the secrecy of the reasons for its action. That could not be done under our form of government even prior to the Freedom of Information Act, and surely cannot be done now.

ARGUMENT

I

THE BROAD PURPOSE OF THE ACT

A. In General

It is the essence of arbitrary and capricious government to take important action and to refuse to tell the injured citizen why it was done. The offense against fair and orderly government is compounded when the agency agrees to reconsider that decision but refuses to explain its grounds so that the request for reconsideration may be meaningful.

Appellants and the Board are in disagreement whether a disallowance such as that of April 11, 1968, can be made without according them a hearing under Section 606(1) of the Merchant Marine Act, 1936.[3] We here assume, as this is not the proceeding by which to settle that issue, that the Board has not violated the statutory command that appellants be given a hearing.

---

[3] "Every contract for an operating-differential subsidy under this title shall provide (1) that the amount of the future payments to the contractor shall be subject to review and readjustment from time to time, but not more frequently than once a year, at the instance of the Commission or of the contractor. If any such readjustment cannot be reached by mutual agreement, the Commission, on its own motion or on the application of the contractor, shall, after a proper hearing, determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest. The testimony in every such proceeding shall be reduced to writing and filed in the office of the Commission. Its decision shall be based upon and governed by the changes which may have occurred since the date of the said contract, with respect to the items theretofore considered and on which such contract was based, and other conditions affecting shipping, and shall be promulgated in a formal order, which shall be accompanied by a report in writing in which the Commission shall state its findings of fact;" [46 U.S.C. 1778(1)]

But it has long been settled that the government agency cannot, simply because freed of a statutory hearing, exercise its powers in arbitrary and unfair fashion. As Justice Frankfurter said in *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 165 (1951):

> "The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. See, *e.g.*, *Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *American Power Co. v. S.E.C.*, 329 U.S. 90, 107-108; *Wong Sung v. McGrath*, 339 U.S. 33, 49."

There cannot, we believe, be much doubt that an essential element of fair procedure is advice to the citizen of the reasons for adverse governmental action, so that he may make meaningful presentation of his own case before decision on reconsideration or review is made. The adverse evidence or information must be made available "so that the registrant may examine it, explain or correct, or deny it." *Eagles v. Samuels*, 329 U.S. 304, 313 (1946). Even in situations where a "fair resume" of investigatory material will suffice, an inadequate summary results in a hearing "conducted on the level of blindman's buff * * * lacking in basic fairness." *Simmons v. United States*, 348 U.S. 397, 405 (1955). Although there is no such requirement spelled out in statute or regulation, the Court in *Gonzalez v. United States*, 348 U.S. 407, 413 (1955) held—

> "* * * if the registrant is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the Board as well as the over-all position of the Department of Justice. See *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 300-305; *United States v. Abilene & So.*

Ry. Co., 265 U.S. 274, 289; *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, 227 U.S. 88, 93."

One may not constitutionally be denied admission to the bar where he "had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division." *Willner v. Committee on Character*, 373 U.S. 56, 105 (1963). We come back again to Mr. Justice Frankfurter in *Anti-Fascist Committee v. McGrath, supra*, 171-172, whose words are as fresh in wisdom as they were 17 years ago:

> "That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

It will be evident that the needs of the appellants are in no way met by the Board's assurance that they will write an opinion when they dispose of our petition for reconsideration. What we need is to know the grounds of this disallowance in presenting our case for reconsideration, so that we may meet and answer the issues instead of playing "blindman's buff," *Simmons v. United States, supra*, 405. As it happens, *Gonzalez v. United States, supra*, 417, deals with this very point. There the Government argued that the draft registrant was not prejudiced by the fact that he did not know the case against him because he could ask rehearing after Appeal Board decision, at which time he would have access to his file. The Court replied that "We believe these remedies to be too little and too late." Its reasons are fully applicable here—

> "Too little, because the right to present petitioner's side of the case is broader than the bare right to correct 'errors' made by the Department in its recommendation. Too late, because, except with the permission of the national or state Director, only the local Board may reopen the case; and a certain reluctance is to be expected after the Appeal Board, albeit on incomplete presentation, has rejected the registrant's claim."

We consider, in sum, that the refusal of appellees to tell us why the subsidy disallowance, retroactive for periods up to 7 years, has been made is so shocking a departure from the traditions of our Government as to become a denial of due process of law. We need not, however, pursue so broad a ground for our relief, since the Freedom of Information Act of July 4, 1966, Public Law 89-487, now 5 U.S.C. § 552, was enacted to prevent just such official secrecy, and seems to us clearly violated by the appellees' action.

B. The Purposes of the Freedom of Information Act

One cannot read 5 U.S.C. § 552, *infra*, pp. A-1 - 4, without being impressed with the depth of the Congressional purpose to make governmental information available to those who are governed. We deal with the exemptions from the Act below. They impose substantial qualifications to the application of the Act, but can hardly serve to obscure the Congressional purpose.

Agencies are required by the Act to make public all adjudicatory opinions, all statements of policy and interpretations of law, and all staff memoranda and instructions that affect the public [§ 552(a)(2)]. All other "identifiable records" are to be made "promptly available to any person" [§ 552(a)(3)]. Special enforcing jurisdiction is given the district courts: the cases "shall be assigned for hearing and tried at the earliest practicable date and expedited in every way." [§ 552(a)(3)]. Finally, in a completely unique provision the usual presumptions in favor of the agency are

reversed: "the court shall determine the matter de novo and the burden is on the agency to sustain its action." [§ 552(c)(3)].

These broad and forcible provisions reflect the depth of the Congressional concern. When the Senate Committee reported the bill it said:[4]

> "* * * Many witnesses have testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.
>
> "Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in Section 3 of the Administrative Procedure Act as - 'requiring secrecy in the public interest,' or 'required for good cause to be held confidential.'
>
> "It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld.
>
> * * *
>
> "A government by secrecy benefits no one.
>
> "It injures the people it seeks to serve; it injures its own integrity and operation.
>
> "It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."

The report of the House Committee covered much the same ground.[5]

---

[4]S. Rep. No. 813, 89th Cong., 1st Sess. (1965), pp. 3, 10.

[5]H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).

President Johnson, on signing the bill, said:[6]

> "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.
>
> * * *
>
> "I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.
>
> "I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest.
>
> "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

C. The Requirements of § 552(a)

There is no question here of asking for a document not identifiable under § 552(a)(3). We want to see the memorandum described in the Board minutes as that "dated November 26, 1965, revised December 20, 1967" recommending "manning scales for the conventional C-4 design type vessels" operated by appellants. The minutes recite that "Copy of the foregoing memorandum and other pertinent documents are in the files of the Secretary." [App. 65].

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[6] 2 Weekly Comp. of Pres. Docs. 895.

Nor have we, the exemptions of the Act apart, any doubt that appellees are in violation of § 552(a)(2). Whether or not the April 11 disallowance was an "order, made in the adjudication of cases,[7] it was surely "instructions to staff that affect a member of the public." The provisions of § 552(a)(2) requiring publication (with clearly justified deletions to prevent invasion of personal privacy), indexing, and availability to the public, quite clearly look to the explanatory as well as to the ordering part of the agency document. When pp. 27-31, containing the ordering paragraphs, are copied off by the Board it cannot under § 552(a)(2) keep secret the explanatory pp. 1-26.[8]

The Act, as the President said (*supra*, p. 14), is designed to ensure that "No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest." Section 552(a) is, both generally and in this case, amply effective to secure that end. We turn, then, to the inquiry as to whether the exemptions of § 552(b) make delusive the announced purposes of the Congress and the President in enacting the measure.

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[7]5 U.S.C. § 551(b) defines "order to mean "the whole or any part of a final disposition * * * of an agency in a matter other than rule-making." "Rule is defined in § 551(4) to include "prescription for the future of rates, wages * * * or allowances therefor."

[8]Indeed, it is only by what the Board describes as an internal "misunderstanding" that the order was not promptly enforced by executing a refund of subsidy payments for seven years past [App. 56-58]. Had it not been for this "misunderstanding" the Board in enforcing its secret decision would have been in further violation of § 552(a)(2), that such a decision "may be relied upon, used * * * against a party only if" indexed or the party has actual and timely notice "of the terms thereof."

II

THE DOCUMENT IS NOT AN EXEMPTED "INTRA-AGENCY MEMORANDUM"

The appellees are not likely to urge that their withholding of the document is consistent with the general purposes of the Freedom of Information Act. They have instead insisted that the secrecy is justified by § 552(b)(5):

> (b) This section does not apply to matters that are—
>
> * * *
>
> (5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than the agency in litigation with the agency.

The defense fails because (a) the memorandum on April 11 became externally operative and was no longer only "intra-agency," and (b) it is in any case available to appellants in litigation with the Board.

A. The Memorandum Is No Longer "Intra-Agency"

An "intra-agency memorandum" which contains recommendations to the agency which are copied out by the agency and enforced as its order becomes thereby the agency decision; it is no longer an internal memorandum to be shielded from public view. It has by the agency action become an externally operative memorandum. The Board on April 11 did not read and put aside staff chit-chat, nor did it reject unapproved staff speculation; it made instead a plain and forthright adoption of the recommended order. If plaintiffs are to pay back $3.4 million of subsidy accrued over 7 years in the past on the basis of pp. 27-31 of that memorandum, they are surely entitled to know why, which is presumably explained in pp. 1-26 of that same memorandum.

We are not lacking in authoritative explanations of the "intra-agency memorandum" exemption from the Act. The House Committee[9] explained:

> "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended. and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy."

The Senate Committee used almost the same language.[10]

> The President in signing the bill said:[11]
>
> "Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions."

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[9]H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10.

[10]S. Rep. No. 813, 89th Cong., 1st Sess., p. 9: "* * * It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exceptions as narrowly as consistent with efficient Government operations."

[11]2 Weekly Comp. of Pres. Docs. 985.

These explanations put the present memorandum outside the exemption. When the staff memorandum has been translated into agency action, its disclosure is not "premature" [S. Rpt., President]. It is not at that stage a disclosure before the agency "completes the process of * * * issuing an order" [H. Rpt.]. Disclosure of a memorandum after the agency has made it externally operative by no means implies that "all internal communications were made public" [H. Rept.] or that "all such writings were to be subjected to public scrutiny" [S. Rpt.].

The implications of appellees' position are startling. If staff memoranda are to be shielded from public view even when they become the basis of agency action, the agency would have in every case an uncontrolled option: (a) It can write an explanatory opinion, or release the staff memorandum; or (b) It can assert that, as it acted on the basis of a staff memorandum, it is entitled to keep secret the reasons for its action.

It does appellants no good to be told that the Board expects to write an opinion in dealing with our petition for reconsideration.[12] That opinion will in effect tell us whether we have guessed right or guessed wrong as to the bases of the Board's April 11 action. If our petition is to be meaningful, we need to deal with the precise grounds of that action. Without the relief sought in this case, we are forced to direct our arguments to what we must guess was in the minds of the Board members.

We have no desire to inhibit the Government dialogue. But if access to a memorandum after it has been translated into agency action is to be avoided lest the Government "operate in a fishbowl," then we have, indeed, become a nation which is governed by secret decree.

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[12]Compare, *Kafka, The Trial* (Knapf, 1957 Ed.), pp. 6-7: "'You can't go out. You are arrested.' 'So it seems,' said K, 'But what for?' He added, 'We are not authorized to tell you that. Go to your room and wait there. Proceedings have been instituted against you, and you will be informed of everything in due course.'"

B. The Memorandum is Available in Litigation with the Agency

The exemption of § 552(b)(5) does not cover an intra-agency memorandum which would "be available by law to a party other than the agency in litigation with the agency."[13] We consider the law clear that this memorandum would be available to us if we found it necessary to litigate the manning disallowance with the Board.

1. *The Court of Claims.* Litigation over subsidy contracts under the Merchant Marine Act, 1936, can be maintained only in the Court of Claims. *American President Lines, Ltd. v. Federal Maritime Board*, 133 F. Supp. 100, 103 (DC, 1955), aff'd 98 App. D.C. 259, 235 F.2d 18 (CADC, 1956). That Court, it can hardly be disputed, will order the production of documents such as this which underly or explain decisions of the Board.

In *Pacific Far East Line, Inc. v. United States*, Ct. Cls. No. 119-63, a subpoena issued for "memoranda to the Maritime Administrator from a division of the office of Government Aid recommending financial treatment under subsidized operations * * * leading to a letter dated March 1956 from the Administrator to PFEL; the staff recommendation dated on or about November 5, 1953, which led to the Administrator's action of November 17, 1954 * * *." The Government moved to quash. The Commissioner denied the motion. The Government sought review by the Court on the ground, *inter alia*, "plaintiff seeks discovery of intra-agency staff advisory opinions and recommendations, not objective factual information. But such documents are privileged against inspection or against public interest." It attached a May 6, 1967, letter from the Acting Maritime Administrator urging that the memoranda and recommen-

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[13]The House Report, *supra*, and the Attorney General's Memorandum on the Public Information Section (1967), p. 35, add the word "routinely" available. If that adverb in any way expands the exemption, it is sufficient that it is not in the law itself.

dations "are merely advisory in nature * * * or intra-office matters. A disclosure * * * would tend to discourage the staff * * * from giving complete and candid advice, and * * * would be injurious to the public interest and are privileged." The Court on June 9, 1967, denied the request for review.[14] [App. 26-32.]

The Court of Claims practice with respect to this Board follows in the tradition of its rules as to discovery with respect to Government information generally. Perhaps the leading case as to "internal memoranda" is Mr. Justice Reed's opinion in *Kaiser Aluminum & Chemical Corp. v. United States*, 141 C.Cls. 38, 157 F.Supp. 939 (1958). There the plaintiff, to prove violation of an "equally-favorable" clause in a contract for sale of an aluminum plant demanded and received "all internal GSA reports, memoranda or other documents" relating to the sale of aluminum plants, including early drafts of contracts "with Agency justification and interpretation thereof." Upon claim of executive privilege only one document was refused. It was a memorandum of a special assistant to the Administrator "confined to recommendations and advice on program policy" (p. 44). The court said that "When the United States consents to be sued, *simpliciter*, full disclosure of all facts in possession of either party to the litigation is normally desirable" (p. 46). It held that the public policy favoring "open, frank discussion between subordi-

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[14]The order of denial was "without prejudice to the right of the Secretary of Commerce to file within ten days a claim of executive privilege." No such claim was ever filed.

Counsel for defendants in argument below said "the fact that this type of memorandum was made available in one litigated case in the Court of Claims, Your Honor, we would submit is far from routine." Transcript of Proceedings, 6-27-68, p. 15. Apart from the fact that § 552(b)(5) itself says nothing about "routine," only 12 days later a similar order was entered by Commissioner Evans to produce staff memoranda explanatory of this Board's action. *Lykes Bros. Steamship Co., Inc. v. United States*, C. Cls. No. 399-67, July 9, 1968.

nate and chief" (p. 48) "required a much more definite showing of necessity than appears here" (p. 50), where "the objective facts * * * are otherwise available" (pp. 48-49). "If," the Court said (p. 45), "the Special Assistant played a part in the operative events * * * a different situation might exist." In the present case the staff memorandum not only "played a part in the operative events," it constituted the whole of the material before the Board when it took the operative action. In *Kaiser* the question was simply one of breach of contract where the agency reasoning had at most a collateral relevance; here the reasoning of the Board is central to our pending petition for reconsideration.

The confined nature of the privilege allowed by *Kaiser* to internal documents relating only to general policy is shown by the course of decision in subsequent cases. In *Will Weiss*, 155 C.Cls. 825 (1961) 20-25 linear feet of files were made available but some "advisory opinions, recommendations or free and open advisory comments" were withheld (p. 827). There was no disclaimer or contradiction that the subordinate "played a part in the operative events"; production was required.

Richard A. Weiss v. United States, C.Cls. No. 205-65 (slip opinion, July 20, 1967), is a close analogue to this case, and an authoritative reading of *Kaiser*. It required production of a memorandum summarizing the service record of an officer, upon the basis of which authorities higher than the Navy Selection Board removed an officer from service. The Court said (p. 6) the summary—

> "appears to be an exhibit which will be utterly indispensable to the adjudication of this case on the merits.
>
> * * *
>
> "The Secretary of the Navy says the document is staff advice of a subordinate to a superior, and no doubt it is. *Kaiser Aluminum & Chemical Corp. v. United States*, 141 Ct.Cls. 38, 157 F.Supp. 939 (1958). However, before we allowed the claim of

> privilege in that case we also considered whether it was necessary to obtain the document to avoid a miscarriage of justice. We held that it was not in the case then at bar, and accordingly the claim of privilege was successful. Here we have the opposite side of the coin. We are not concerned with military and diplomatic secrets, which are in a class by themselves. The privilege here is not absolute and must yield to compelling necessity."

The practice of the Court of Claims, where alone litigation with this agency can be maintained, is conclusive that this memorandum "is available by law * * * in litigation with the agency."

2. *Generally*. The general law is not, as with the Court of Claims decision in *Pacific Far East* and *Lykes* noted above (pp. 19-20), directed to exactly the same sort of memoranda put to the same sort of use by the same Board which is appellee here. But it points clearly enough to the same conclusion.

(a) We demand access to a staff memorandum which is the basis of and explains an otherwise unexplained Board decision of major importance; our need for access is reinforced because otherwise we cannot adequately develop our petition for reconsideration. In cases analagous to this discovery of such a memorandum has almost invariably been granted.

Probably the closest case is *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 403 (E.D. Mich., 1965), aff'd *Bank of Dearborn v. Manufacturers Nat. Bank of Detroit*, 327 F.2d 496 (CA 6, 1967). There one who challenged the authorization of a national bank branch demanded production of the entire administrative file. The District Court held:

> "[9] The claim of privilege so made we have in part respected and in part denied. We have found it unnecessary to disclose to a curious banking and business world the dollar amounts of deposits, and loans, and similar matters in the branches reported upon in the files. But in another area we have

> denied the privilege. This is in the area of the legal justification for what was here done, its reasons and its motivations. To say that an administrator has discretion does not mean that he can act without reason, that he may grant or withhold his approvals as his uncontrolled caprices may dictate. No official in our system of Government has a power so awesome."

For much the same reasons, the courts have held that in suits for tax refunds, the reports of the agents which explain the assessed deficiency must be produced: "Plaintiffs are entitled to know what defendants' claims and contentions may be." *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 64-68 (N.D. Ohio, 1964); *Frazier v. Phinney*, 24 F.R.D. 406, 410 (S.D. Tex., 1959); *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513, 515 (W.D. Tex., 1963). A contrary result in *B. W. Bliss Co. v. United States*, 203 F.Supp. 175, 176 (N.D. Ohio, 1961) was based upon the fact that the taxpayer had no need of the document, and was so distinguished by the same court in *Timken, supra*, 67-68. *Campbell v. Eastland*, 307 F.2d 478 (CA 5, 1962) was a similar case where the taxpayer showed no need and, indeed, was suspect as to motive.

In somewhat more distant areas, it has been held that even internal memoranda relating to litigating decisions must be produced when the issue is whether the Government or its attorney has abused the litigating process, *United States v. Proctor & Gamble Company*, 25 F.R.D. 485 (D.N.J., 1960); *N.L.R.B. v. Capitol Fish Company*, 294 F.2d 868, 875 (CA 4, 1961), and that the basis of evaluation of tests for registration of a patent attorney must be produced, *Delevay v. Reynolds*, 19 Ad.L.2d 677, 679 (D.C., 1966). So, too, must the findings and conclusions of air force accident investigations be produced. *Machin v. Zuckert*, 114 App. D.C. 335, 316 F.2d 336 (1963), cert. den. 375 U.S. 896.

(b) The courts have, of course, frequently upheld the Government's privilege to keep its internal memoranda

secret, but not in cases where a staff memorandum is necessary to show the reasons for agency action.

Certainly, where the agency has issued an explanatory opinion, or otherwise advised of the grounds of its action, the private parties are not entitled to search out its mental processes by having staff memoranda or testimony added on to the agency decision itself. *Morgan v. United States*, 313 U.S. 409 (1941); *N.L.R.B. v. Botany Worsted Mills*, 106 F.2d 263, 265-67 (CA 3, 1939); *North American Airlines v. Civil Aeronautics Board*, 100 App. D.C. 43, 240 F.2d 867, 874 (CADC, 1957); *Boeing Airplane Company v. Coggeshall*, 114 App. D.C. 338, 280 F.2d 654, 660 (CADC, 1960); *Walled Lake Door Company v. United States*, 31 F.R.D. 258 (E.D. Mich., 1962); *Air Line Pilots Ass'n Internat'l v. Quesada*, 286 F.2d 319 (CA 2, 1961), cert. den. 366 U.S. 962. It is, of course, one thing to protect an agency from a degrading inquiry into what matters others than those stated may have influenced its decision, and quite another thing to protect it in a tyrannical refusal to give any reason whatever for gravely injurious action.

There are other cases, still more remote from the issue here, where internal Government documents have been held privileged. Government files will ordinarily not be opened so that one party may prove his point in litigation with other private parties. *Universal Airline v. Eastern Air Lines*, 188 F.2d 993, 1000 (CADC, 1951) (excepting cases where this is the sole source of evidence). Nor will the courts ordinarily require production of internal documents which discuss litigating policies of the Government. *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 603-05 (CA 5, 1966) (whether NLRB should act on charges of unfair labor practices); *Carl Zeiss Stiftung v. E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.C., 1965) (4500 documents were produced; 49 were heid privileged as "opinions, recommendations and deliberations pertaining to decisions the Department was required to make as to litigation and other matters" which were not necessary in view of the volume of other material); *Clark v. Pearson*, 238 F.Supp. 495, 496

(DC, 1965); *Zacher v. United States*, 227 F.2d 219, 226 (CA 8, 1955). There is, finally something close to an absolute privilege when the documents are certified by the department head as bearing upon the military security or foreign affairs of the Government. *United States v. Reynolds*, 345 U.S. 1 (1953).

In sum, while the Court of Claims practice is conclusive here, since it is the only relevant court, its rule requiring production of documents such as this is wholly consistent with the general judicial treatment of claims of privilege for internal Government documents.

C. Appellees Position is Technically Deficient

We feel obliged to note a technical deficiency in the position of appellees. We should not consider it as satisfactory a ground for decision by this Court as a more broadly based recognition of the requirements of fundamental fairness, the purposes of the Freedom of Information Act, and the practice of the relevant courts. We note it only against the event the Court should consider the issue deserves close and fine analysis rather than broad common sense.

When a Government agency or official seeks to protect an internal memorandum against disclosure he asserts, at least in the case of military secrets, "a privilege which is well established in the law of evidence." *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953). But that privilege, as authoritatively declared in *Reynolds*, 7-8,

> "is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."

Even if, then, this memorandum were protected by the governmental privilege (as we have shown it is not) that privilege can be asserted only by the head of the depart-

ment. Accordingly, most of the cases discussed above (pp. 24-25) in which the privilege has been sustained arose on claims made by the head of the department or of an independent agency.

The Board operates under delegation of authority by the Secretary of Commerce.[15] It could under the *Reynolds* rule assert its privilege only through the Secretary. In order to show that the memorandum would not be available in litigation with the agency, under 5 U.S.C. § 552(b)(5), it must show that the Secretary would have asserted the privilege, for the burden of justifying withholding in this proceeding rests upon the Board. § 552(a)(3).

The Board has not shown that the Secretary would assert the privilege in litigation with the agency. Indeed, the inference from this record is that he would not. In *Pacific Far East Line, Inc. v. United States*, C.Cls. No. 119-63, appellee Gulick asserted the privilege against disclosing a similar memorandum in terms similar to his argument here [App. 31-32]. The Court denied the motion to quash the subpoena "without prejudice to the right of the Secretary of Commerce to file within ten days a claim of executive privilege" [App. 32]. No such claim was filed.[16]

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[15]Reorganization Plan No. 7 of 1961 (75 Stat. 840); Dept. Order No. 117A, P&F, SR par. 105.2.

[16]We note, lest counsel for appellees seek to contrive a back-fire argument, that appellants were not required to put their request for access to the staff memorandum to the Secretary of Commerce. 5 U.S.C. § 551(a) defines "agency" as meaning "each authority of the Government of the United States, whether or not it is subject to review by another agency." The Board's General Order No. 99, prescribing procedures under 5 U.S.C. § 552, makes no reference to the Secretary. 46 C.F.R. § 380.30 et seq.

D. "Full and Frank Discussion" and Appellants' "In Lieu" Request

Many of the cases which in one context or another have protected internal governmental papers from disclosure have followed Mr. Justice Reed in *Kaiser, supra*, p. 20, in emphasizing the public interest in full and frank discussion by staff members of a government agency, and have assumed that the possibility of public disclosure might inhibit the practice.

The affidavit of the Assistant Secretary of the Board seeks to bring the staff memorandum which was before the Board on April 11, 1968, within this reason for non-disclosure [App. 38]. It does *not* state that disclosure of any view or any language in this actual memorandum would embarrass the Board or any of its staff, or that it contains anything which would not have been said if the author had anticipated disclosure to the subsidized lines affected. The affidavit relies instead upon the non sequiter that since "full and frank" staff discussion is necessary, so disclosure of *any* staff memorandum is contrary to the public interest.

The reasoning seems to us to be fanciful, on two cumulative grounds: (a) We do not know why it should be assumed that agency staff members would choke off "full and frank discussion" if they knew the memorandum might some day be disclosed. We know of no reason to believe a Government official is more timorous than the rest of mankind, who manage to get their work done without any privilege against subsequent disclosure of their memoranda. (b) If a privilege against disclosure *is* necessary in any case, that surely ought to be a judgment of the agency (or the court *in camera*) on the individual memorandum. *All* memoranda should not be kept secret because disclosure of *one* might be embarrassing.

Appellants urge that the asserted need for "full and frank discussion" is in any case a contrived argument when used to justify an agency decision based upon secret grounds. The agency need only to state the grounds of its

decision to protect the underlying staff memoranda. If it chooses not to do the work itself, and if the staff memorandum would be embarrassing, it need only direct the staff to prepare a revised memorandum deemed more fit for the public eye.

This is demonstrably the case here. Appellants, only too familiar with the Board's refusal to disclose staff memoranda, initially asked instead only for a statement of the Board's reasons and a summary of the evidence before it when it made the April 11 disallowance. The staff advised that this was feasible, if the Board should approve [App. 4-5]. Only when the Board refused that request did the appellants demand the staff memorandum itself.

The Board in these circumstances cannot plausibly claim that its only interest is to protect the "full and frank discussion" in its staff memorandum. It could feasibly, and we should suppose easily, have achieved that end by giving appellants the requested statement of its reasons and the summary of its evidence. When the Board denies us *both* the underlying staff memorandum and also, in lieu thereof, a statement of its reasons, it seems incontestibly to be acting to preserve only one thing—the secrecy of its grounds of decision. That surely cannot be a tolerable objective under our system of government.

Appellants, having made this "in lieu" offer before the agency, thought they should continue it in their court action [App. 6]. We viewed it as an alternative held open to the Board, if they considered disclosure of the memorandum upon which they acted as too acutely embarrassing, not as an alternative ground for an independent court order. We consider, however, that with the passage of time it is no longer a satisfactory alternative. Our case for reconsideration will be filed on August 12, 1968, and will presumably be pending at the time of this Court's decision.[17] We could never be sure, in the nature of human

[17]If this Court should reverse the District Court while our petition for reconsideration is pending before the Board, appellants can by

memory, that a statement intended to show the grounds of the April 11 disallowance would not by the fall have been converted into an effort to rebut our August 12 submission.

CONCLUSION

A seriously adverse order of an agency which is based upon secret grounds offends the traditions of a democratic government, and doubly so when the agency agrees to reconsider that order but refuses to disclose the grounds of its decision so that our petition for reconsideration may be fully meaningful. The Freedom of Information Act confirms the settled rules against secret government, and provides a remedy for those injured by excessive secrecy. The Congress was enacting a law, not merely adding to the literature. It should be applied here.

Respectfully submitted,

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Of Counsel

July 31, 1968

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supplemental submission to the Board cure the secrecy–born defects of its petition as filed August 12. If the Board should before decision of this Court have adhered to its April 11 determination, the grounds of that determination as shown in the underlying staff memorandum will remain a useful supplement to its anticipated opinion on reconsidsideration so far as concerns subsequent proceedings before the Secretary of Commerce and in the Court of Claims. If the Board, on the other hand, should before decision of this Court reverse its April 11 disallowance in its entirety, that action would seem to eliminate our need for access to that memorandum and would accordingly moot this proceeding.

I hereby certify that I have this day served copies of the foregoing brief upon counsel for the appellees, Hon. Edwin L. Weisl, Jr., Assistant Attorney General, U. S. Department of Justice, and Hon. David G. Bress, United States Attorney for the District of Columbia, by delivery of same to their respective offices.

Warner W. Gardner

APPENDIX A

U. S. CODE, TITLE 5

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be

available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons

affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying–

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if–

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accord-

ance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and made available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a

party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

No. 22,091

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN MAIL LINE LTD., ET AL.,

Appellants,

v.

JAMES W. GULICK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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I N D E X

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IN THE UNITED STATES COURT OF APPEALS FOR
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BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUE PRESENTED

Whether the internal staff memorandum to the Maritime Subsidy Board which plaintiffs seek is exempt from disclosure under the Public Information Section of the Administrative Procedure Act, as an "intra-agency" memorandum "which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). *

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* This case has not previously been before this Court.

STATEMENT OF THE CASE

The plaintiffs-appellants, three operators of steamship services, brought this action against the Maritime Administration of the United States Department of Commerce, the Maritime Subsidy Board of the Maritime Administration (hereafter "the Board"), and James W. Gulick (Acting Maritime Administrator and Chairman of the Maritime Subsidy Board), for the purpose of compelling the defendants to turn over to plaintiffs a specified internal staff memorandum to the Maritime Subsidy Board pursuant to the Public Information Section of the Administrative Procedure Act, 5 U.S.C. 552 (App. 2-6). [1] On July 1, 1968, the district court, on cross-motions for summary judgment, dismissed the action (App. 33, 69). [2]

The statutory and factual background of this case may be stated as follows:

1. "Operating-differential subsidies" under the Merchant Marine Act

Under Title VI of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. 1171-1183, American shipowners may apply to the United States Government for financial aid in the operation of vessels which are to be used in an essential service in the foreign commerce of the United States ("operating-differential subsidies").

1/ "App." refers to the Appendix to the Briefs, filed pursuant to Rule 30 of the Federal Rules of Appellate Procedure.

2/ At the oral argument of the motions, plaintiffs withdrew their additional motion for a preliminary injunction (Transcript of Hearing on Motions, June 27, 1968, pp. 20-21).

46 U.S.C. 1171. The Act provides that, after the shipowner's application has received administrative approval, the Government may enter into a contract with the applicant for a period not to exceed twenty years for the payment of such "operating-differential subsidies," which contract shall be subject to "such reasonable terms and conditions, consistent with this chapter," as the responsible administrative agency "shall require to effectuate the purposes and policy of this chapter * * *." 46 U.S.C. 1173(a). 3/ The Act provides that, under such subsidy contracts, the amount of the "operating-differential subsidy" shall not exceed the excess of (1) "the fair and reasonable cost" of insurance, maintenance, repairs, wages and subsistence of officers and crews, and any other item of expense in which the administrative agency "shall find and determine" that the applicant is at a substantial disadvantage in competition with foreign country vessels with whom the American vessels substantially compete, over (2) the "estimated fair and reasonable cost" of the same items of expense if the applicant's vessels were operated under the registry of the foreign country. 46 U.S.C. 1173(b). 4/ In other words, "operating-differential subsidy" rates represent the percentage by which the

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3/ In 1967, fourteen operators participated in the "operating-differential subsidy" program, with a total of 311 ships under contract. Payments during 1967 as "operating-differential subsidy" due for 1967 and prior years totalled over $175 million. Annual Report of the Secretary of Commerce, Fiscal Year Ended June 30, 1967, p. 83.

4/ The Act also specifies that the contract shall require the subsidized shipowner to conduct his operations "in the most economical and efficient manner * * *." 46 U.S.C. 1176(6).

fair and reasonable cost to a U.S. operator of operating a U.S. flag vessel with a U.S. crew exceed the estimated fair and reasonable cost to a foreign operator of operating the same vessel with a foreign crew under the registries of the substantially competitive foreign countries.

Under present law, the statutory functions with respect to "operating-differential subsidies," which the Merchant Marine Act formerly vested in the Federal Maritime Board, are vested in the Secretary of Commerce. Reorganization Plan No. 7 of 1961, Section 202 (b)(1), effective August 12, 1961 (75 Stat. 840, 842). The Secretary of Commerce, in turn, administers the "operating-differential subsidy" program through the Maritime Administration and the Maritime Subsidy Board of the Department of Commerce. Department Order 117-A, 31 Fed. Reg. 8087. All subsidy contracts contain a standard article (I-4) which provides, inter alia, that the "operating-differential subsidy" shall be paid on the basis of "fair and reasonable cost (as determined by the Board) of * * * wages and subsistence of officers and crews * * *" (App. 40-41; emphasis added). Standards for administrative determination of "operating-differential subsidy" rates are set forth in the Manual of General Procedures for Determining Operating-Differential Subsidy Rates, issued November 25, 1957, by the Federal Maritime Board

and the Maritime Administration (hereafter "ODS Manual").[5] In addition, the Maritime Administration and Maritime Subsidy Board issue "Accounting Instructions" and "Circular Letters to all Subsidized Operators," which provide instructions to subsidized shipowners in matters affecting administration of subsidy contracts.[6]

As noted above (pp. 3-4), the administrative computation of the "operating-differential subsidy" rates must include an estimate of the "fair and reasonable cost" of various items of expense, including wages and subsistence of officers and crews. 46 U.S.C. 1173(b). The determination of this element of the "operating-differential subsidy" formula requires, inter alia, a determination of "vessel manning scales," i.e., the appropriate number of men and officers for service on a particular vessel. The ODS Manual specifically provides that the responsible agency must "approve" and "adjust" all "vessel manning scales" on subsidized vessels in order to insure that subsidy rates are based on "fair and reasonable" wage costs (infra, pp. 12a,16a). The Board's Circular Letter No. 17-61 (dated December 13, 1961), which was sent to all subsidized operators,

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5/ This Manual (relevant portions of which are reproduced below, pp. 1a-17a) was drafted in consultation with the subsidized shipowners who, through their collective group known as the Committee of American Steamship Lines, specifically stated that application of its procedures "will be reasonably satisfactory and we accordingly offer no objection to them" (Letter dated November 2, 1956, on file with the Maritime Subsidy Board).

The 1957 ODS Manual was preceded by a Manual issued in 1951, which stemmed from a report by the Comptroller General of the United States, filed with the Congress, which criticized methods employed in determining "operating-differential subsidy" rates. Representatives of the Maritime Administration, the General Accounting Office, and the subsidized industry met on many occasions to devise a Manual providing improved methods for the calculation of subsidies which would assure (1) fair treatment to all concerned and (2) full understanding by the industry as to the basis of the subsidy calculations.

6/ The agencies responsible for administration of the Merchant Marine Act have express statutory authority to "adopt all necessary rules and regulations to carry out the powers, duties, and functions" vested in them by the Act. 46 U.S.C. 1114(b).

specifically required subsidized shipowners to submit to the Board for its approval proposed "vessel manning scales" on all newly constructed vessels entering service after January 1, 1962 (infra, pp. 22a-23a).

2. Plaintiffs' applications for approval of "vessel manning scales"

The plaintiffs in the instant case are shipowners who have contracted with the United States to receive "operating-differential subsidies" pursuant to Title VI of the Merchant Marine Act (App. 2-3). At various times the plaintiffs filed with the Maritime Subsidy Board applications for the approval of "vessel manning scales" on certain of their vessels (App. 34, 37, 69). The official minutes of the Maritime Subsidy Board show that, at a Board meeting held on April 11, 1968, the Board ruled (1) on plaintiffs' pending applications for the approval of "vessel manning scales," and (2) on the "manning" application of a fourth shipowner not a party to this suit (App. 33-34, 37, 65, 69).

On April 12, 1968, the Assistant Secretary of the Board wrote to each of the plaintiffs, informing them of the Board's April 11, 1968 ruling with respect to their "vessel manning scales" (App. 4, 7-11). The letters set forth (1) those positions and wages on the affected vessels which the Board found were "fair and reasonable and necessary for the efficient and economical operation" of the ships, and (2) other positions and wages which did not meet this standard, and which were "clearly improvident, unnecessary and excessive for the efficient and economical operation" of the vessels (ibid.). The letters informed plaintiffs that the Board's April 11, 1968, ruling was subject to review by the Secretary of Commerce under procedures set forth in Department of Commerce Order No. 117-A (46 C.F.R. Part 202) (App. 11).

After plaintiffs petitioned for reconsideration of the Board's April 11, 1968 ruling, the Board informed plaintiffs (1) that it would reconsider its determination as to plaintiffs' "vessel manning scales"; (2) that it would "maintain an open mind" in the consideration of the petition for reconsideration, which would be "carefully considered"; (3) that it would receive from plaintiffs any evidence or arguments which they might wish to submit to the Board; and (4) that after considering such material, it would issue a formal opinion ("A" Series), explaining the reasons for its decision (App. 36, 39-40, 59, 68). 7/

In order to enable plaintiffs "to make a meaningful presentation on reconsideration of the manning disallowances," the Board made available to plaintiffs "extensive records" dealing with "vessel manning scales" (App. 52-53, 57-63). After examining these records, plaintiffs acknowledged that the job of locating the records, "many of which extended back 30 years, was undoubtedly a substantial one and we appreciate the thorough and cooperative manner in which the documents were first located and then made available to us" (App. 52). As stated by plaintiffs' counsel, "the Board has made available to us, at very considerable effort, a great mass of historical data relating to manning from pre-war days on up to the present" (Transcript of Hearing on Motions, June 27, 1968, p. 6). Plaintiffs thereafter made to the Board,

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7/ The Assistant Secretary of the Maritime Subsidy Board also assured plaintiffs that, if the Board's decision on reconsideration is adverse to plaintiffs, the time for filing a petition for review by the Secretary of Commerce will run from the Board's decision on reconsideration (App. 35).

in the pending reconsideration proceeding, "a very elaborate presentation" (Appellants' Brief, p. 5, fn. 2) of their position with respect to "vessel manning scales." At the present time the Board is studying the 141 page "Brief for the petitioners on reconsideration," as well as the annexed volume of 152 exhibits. 8/

3. The internal staff memorandum to the Maritime Subsidy Board

As noted above (p. 6), the Maritime Subsidy Board acted on plaintiffs' "vessel manning scales" on April 11, 1968. The official minutes of the Board meeting of April 11, 1968, show (App. 33-34, 65) that the Board "considered" an internal staff memorandum dated November 26, 1965, revised December 20, 1967, in which subordinate personnel of the Board made various recommendations to the Board with respect to plaintiffs' "vessel manning scales." The only other material considered by the Board at its April 11, 1968 meeting was (1) plaintiffs' letter submissions requesting approval of "vessel manning scales" (and the submission of one other shipowner not a party hereto), and (2) certain attachments to the Board's internal staff memorandum (App. 34, 37-38, 69).

8/ The intermediate nature of the Board's April 11, 1968, ruling on "vessel manning scales" should be made clear to the Court. As indicated above (p. 5), "manning" is only one component of the subsidy wage rate determination required by the ODS Manual and the subsidy contracts. Thus, in the instant case, any Board decision as to "manning" will be significant to plaintiffs only insofar as it affects plaintiffs' subsidy wage rates. But if the plaintiffs should be dissatisfied with the subsidy wage rates which may ultimately be offered to them by the Board, Section 606(1) of the Merchant Marine Act, 46 U.S.C.1176(1), provides them with the opportunity to contest that subsidy wage rate (including the "manning" component thereof) in a "proper hearing." The rules of practice and procedure governing such hearings (46 C.F.R. Part 201) provide all the procedural protections of the Administrative Procedure Act, (continued)

The Board's minutes show (App. 33-34, 65) that the Board did not adopt the internal staff memorandum and convert it into the decision of the Board. 9/ As made clear by the affidavit of John M. O'Connell, Assistant Secretary of the Maritime Subsidy Board (App. 37-42), the Board simply copied the suggested wording of the concluding portion of the staff memorandum entitled "Recommendation" (pp. 27-31) as a matter of convenience; and such use of the "Recommendation" portion of the memorandum did not constitute adoption of the opinions, analyses, etc., expressed in the first part (pp. 1-26) of the staff memorandum.

8/ (continued) and assure plaintiffs of the right to (1) a recommended decision by an impartial hearing examiner, (2) a decision by the Maritime Subsidy Board, and (3) an opportunity to petition the Secretary of Commerce for final administration review. Moreover, if the final administrative determination as to subsidy wage rates is unsatisfactory to plaintiffs, they may bring suit in the Court of Claims or in the district court (for claims not exceeding $10,000) for any alleged breach of contract or violation of Federal law. 28 U.S.C. 1491 and 1346(a)(2).

9/ The minutes read as follows (App. 33-34, 65):

> The Maritime Subsidy Board considered memorandum dated November 26, 1965, revised December 20, 1967, recommending that the Board approve for subsidy purposes manning scales for the conventional C4 design type vessels operated by States Steamship Company, Pacific Far East Line, Inc., American Mail Line, Ltd., and American President Lines, Ltd.
>
> After discussion, upon the "yea" vote of Chairman Gulick, Member Davis and Alternate Member Dawson, the Maritime Subsidy Board found and determined with respect to each of the C4 conventional type vessels and operators, as indicated below, that, effective with the date each vessel entered into the subsidized service:
>
> (Quote Recommendations I thru IV, pages 27 thru 30)

(continued)

Thus, Mr. O'Connell stated (App. 39):

> Based upon examination of the "minutes" of said meeting, which is a public document, knowledge of the Board's procedures, experience with and responsibility for custody of the records of the Board, and actual presence at the afore-mentioned meeting, affiant states without qualification that the Board did not approve the internal staff memorandum and convert it into a final opinion and order, as claimed by the plaintiffs. The suggested wording of that portion of the memorandum entitled "Recommendation" was utilized by the Board and, with insignificant stylistic changes, was set forth in the letter to all plaintiffs dated April 12, 1968 * * *.

The nature and function of the Board's internal staff memorandum and its attachments is also described in Mr. O'Connell's affidavit as follows (App. 38):

> * * * [S]aid memorandum and attachments embody the statements and views of staff personnel of the Board. They set forth administrative bases for action, opinions of various staff officers and employees, and recommendations as to the action that should be taken by the Board. This is merely a staff report within the agency from subordinates to their superiors. The latter may accept the contents and opinions thereof, may arrive at different conclusions than those suggested, or may reject the entire memorandum and/or direct further study. The Board may utilize a suggested format in taking action, but the memorandum is not adopted. It is, therefore, an intra-agency communication which serves as an initial basis for a recommended course of action. [Emphasis added.]

9/ (continued)

> Thereafter, Chairman Gulick announced that in his capacity as Acting Maritime Administrator he had found and determined that:
>
> (Quote Recommendation V, pages 30 and 31)
>
> Copy of the foregoing memorandum and other pertinent documents are in the files of the Secretary.

Mr. O'Connell's affidavit also explains the vital importance to the Maritime Subsidy Board of preserving inviolate internal staff memoranda of the type here involved (App. 38):

> Because of the important function of the staff memorandum in the administration of a program involving payments from the United States Treasury in the form of subsidy grants, it is imperative that it be a full and frank disclosure of all opinions and analyses ascertained by the numerous staff officers and employees. The Board cannot effectively perform its statutory function under the Merchant Marine Act, 1936, as amended, and administer its long-range (20 year) subsidy contracts without having the benefit of such full and frank disclosure of the opinions and conclusions of its officers and employees. Due to the institutional nature of the Board, it is necessary that such opinions and conclusions be set forth in writing. [Emphasis added.]

Because of these policy considerations, the Board, following its consistent policy, refused to turn its internal staff memorandum over to plaintiffs (App. 14-22, 36, 58-59).

4. Proceedings in the District Court

As noted above (p. 2), plaintiffs brought this action against the various governmental defendants, pursuant to the Public Information Section of the Administrative Procedure Act, 5 U.S.C. 552, for the purpose of obtaining the above-discussed internal staff memorandum to the Maritime Subsidy Board (App. 2-6). Plaintiffs' complaint also sought "any other evidence considered" by the Board in making its April 11, 1968, determination (App. 6).

In lieu of the foregoing relief, plaintiffs requested the court to order the defendants to supply them with "a statement of the reasons" for the Board's April 11, 1968, decision and with "a summary of the evidence before the Board * * *" (App. 6). The district court considered the exhibits and briefs filed by the parties, and, after hearing oral argument, dismissed the action (App. 1, 69). 10/

10/ Several errors in plaintiffs' statement of the case (Appellants' Brief, pp. 2-5) may be here noted. As we have seen (supra, p. 6), there is no substance in plaintiffs' assertion (Appellants' Brief, p. 3), that "No notice had been given appellants that the issue [of "vessel manning scales"] was under consideration by the Board, and no submission of their case was or could have been made by appellants." Also, as seen above (supra, pp. 6-8), there is no substance in plaintiffs' assertion (Appellants' Brief, p. 5) that they "do not know" what matters to develop in the pending reconsideration proceeding.

Although the correctness of the Board's April 11, 1968, ruling on "vessel manning scales" is not at issue in this action, we also note that the Board denies that "without significant exception" the Board has accepted as fair and reasonable "vessel manning scales" as determined by collective bargaining agreements (Appellants' Brief, p. 2). See, e.g., the pending action of Moore-McCormick Lines, Inc. v. United States, Court of Claims Dkt. No. 143-68. See, also, Circular Letter No. 8-60, reprinted infra, pp. 20a-21a. It may be noted that the House Committee on Merchant Marine and Fisheries has insisted that the responsible administrative agency "make a completely independent determination" that only "fair and reasonable" wages are utilized as the basis for "operating-differential subsidy" payments, and that collective bargaining agreements "shall not be regarded as conclusive * * *." H.R. Rep. No. 1658, 84th Cong., 2d Sess., p. 31 (1956). The Board also denies plaintiffs' apparent assertion (Appellants' Brief, p. 2) that the collective bargaining agreements relating to the type of vessels involved here expressly required itemized crewing in the number of 58 men.

STATUTE INVOLVED

Section 3 of the Administrative Procedure Act, as amended by P.L. 90-23, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying--
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
>
> * * * * *
>
> (3) * * * each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *
>
> * * * * *
>
> (b) This section does not apply to matters that are--
>
> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> * * * * *

SUMMARY OF ARGUMENT

The issue before this Court is whether the internal staff memorandum to the Maritime Subsidy Board is exempt from disclosure under the Public Information Section of the Administrative Procedure Act, as an "intra-agency" memorandum which "would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). There is no doubt that the Board's staff memorandum clearly does fall within this exemption.[11/]

First, there is no substance in plaintiffs' assertion that the staff memorandum lost its status as an "intra-agency" memorandum after it was, allegedly, "adopted" by the Board and "converted" into a Board decision. The affidavit of John M. O'Connell, Acting Secretary of the Maritime Subsidy Board, conclusively establishes that the Board merely copied the "Recommendation" portion of the staff memorandum as a matter of convenience, and that it did not adopt the opinions, analyses, etc., expressed in the memorandum by subordinates of the Board. The staff memorandum, therefore, plainly never lost its status as an "intra-agency" memorandum.

11/ Appellants' Brief seeks to create the impression that the procedures of the Maritime Subsidy Board followed in this case have deprived plaintiffs of substantial rights without due process of law. Although the question of the correctness of the Board's April 11, 1968, intermediate ruling with respect to "vessel manning scales," and the adequacy of the Board procedures, is not before this Court, the above statement of the case clearly shows that the procedures followed by the Board in this case are fully consistent with law and eminently fair. By contrast, in Gonzales v. United States, 348 U.S. 407 (1955) (Appellants' Brief, pp. 11-12), the selective service registrant's claim to conscientious objector status was unfairly rejected. And since the Maritime Subsidy Board in this case plainly did not act on "secret evidence," the other cases cited in Appellants' Brief, pp. 10-11 (none of which involved intra-agency memoranda, and all of which involved final administrative action in areas other than administration of subsidy contracts), are also inapposite.

Second, it is also clear that the Board's internal staff memorandum "would not be available by law to a party other than an agency in litigation with the agency."

Mr. O'Connell's affidavit clearly establishes that the Board's staff memorandum, together with its attachments, consists of opinions, conclusions, analyses, and recommendations of staff personnel, and that the uninhibited expression of such opinions, analyses, etc., to the Board, is "imperative" if it is to fulfill its important functions under the Merchant Marine Act. It has long been settled that internal governmental documents containing opinions, conclusions, recommendations and deliberations of executive branch personnel are subject to the claim of Executive Privilege and need not be disclosed to the public or to private litigants. See, e.g., Machin v. Zuckert, 114 U.S. App. D.C. 335, 316 F. 2d 336 (C.A.D.C., 1963), certiorari denied, 375 U.S. 896; Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F. 2d 654 (C.A.D.C., 1960); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C., 1966), affirmed per curiam sub nom. V.E.B. Carl Zeiss Jena v. Clark, "for the reasons stated in" the district court opinion, ___ U.S. App. D.C. ___, 384 F. 2d 979 (1967), certiorari denied, 389 U.S. 952. The reason behind the rule is simply that if the officials involved "are aware that their sentiments * * * may be revealed by their fellow participants, it is clear that caution or worse would remove all candor from their minds and tongues." N.L.R.B. v. Botany Worsted Mills, Inc., 106 F. 2d 263, 267 (C.A. 3, 1939); accord, Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939,

945-946 (Ct. Cl., 1958). President Johnson, when signing into law the Act now before this Court, emphasized this principle:

> Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

2 Weekly Compilation of Presidential Documents 895 (July 11, 1966).

For these reasons, 5 U.S.C. 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency * * *." This Court, in the only appellate decision construing this language, has ruled that it constitutes a "clear expression of congressional policy to hold the line on disclosure of materials" containing "'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Freeman v. Seligson, ___ U.S. App. D.C. ____, ____ F. 2d ___, Nos. 20,478 and 20,482, decided June 28, 1968, Slip Opin., pp. 19-20, quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra. The legislative history and the contemporaneous construction by the executive agency dealing with the Act confirm this view. See, e.g., H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10 (1966); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, pp. 35-36 (June 1967). Thus, reason and authority make it perfectly clear that the internal agency opinions, analyses, etc., involved in this case, since they are subject to a claim of

Executive Privilege, "would not be available by law to a party other than an agency in litigation with the agency," and thus are exempt from disclosure under the Act.

It should be emphasized that, in contrast to the opinions, analyses, etc., of subordinates of the Board which it seeks to maintain in confidence, the Board has turned over to the plaintiffs all relevant factual material consisting of "a great mass of historical data relating to manning * * *." The only apparent reason for plaintiffs' attempt to obtain the internal staff memorandum to the Board is plaintiffs' desire to "probe the mental processes" of the Maritime Subsidy Board. The law, of course, wisely does not permit such a violation of "the integrity of the administrative process." See United States v. Morgan, 313 U.S. 409, 422 (1941); Norris & Hirschberg, Inc. v. S.E.C., 82 U.S. App. D.C. 32, 36, 163 F. 2d 689, 693 (C.A.D.C., 1947), certiorari denied, 333 U.S. 867; Associated-Banning, et al. v. United States, C.A.D.C., No. 13,384, Order dated September 21, 1956.

ARGUMENT

THE INTERNAL STAFF MEMORANDUM TO THE MARITIME SUBSIDY BOARD IS EXEMPT FROM DISCLOSURE UNDER THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT, AS AN "INTRA-AGENCY" MEMORANDUM "WHICH WOULD NOT BE AVAILABLE BY LAW TO A PARTY OTHER THAN AN AGENCY IN LITIGATION WITH THE AGENCY." 5 U.S.C. 552(b)(5).

5 U.S.C. 552(b)(5) creates an exception to the disclosure provisions of the Public Information Section of the Administrative Procedure Act, as follows:

> (b) This section does not apply to matters that are --
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency * * *.

As we demonstrate below, the internal staff memorandum to the Maritime Subsidy Board which plaintiffs here seek, plainly falls within this exemption.

A. The Board's Internal Staff Memorandum is an "Intra-Agency" Memorandum.

Plaintiffs appear to be contending (Appellants' Brief, pp. 16-18) that the internal staff memorandum to the Maritime Subsidy Board which they seek is not an "intra-agency" memorandum because it was "adopted" by the Board and "converted" into a Board decision. It is abundantly clear, however, that the premise of plaintiffs' reasoning is utterly fallacious. Nothing in the minutes of the Board's April 11, 1968, meeting (supra, pp. 9-10) supports plaintiffs' bare assertion as to the use which the Board made of the staff memorandum. To the contrary, the affidavit of John M. O'Connell,

Assistant Secretary of the Maritime Subsidy Board, conclusively establishes that the Board simply copied the suggested wording of that portion of the staff memorandum entitled "Recommendation" as a matter of convenience, and that such use of the "Recommendation" portion (pp. 27-31) of the memorandum did not constitute adoption of the opinions, analyses, etc., expressed in the first portion (pp. 1-26) of the staff memorandum. Thus, Mr. O'Connell stated (App. 39):

> Based upon examination of the "minutes" of said meeting, which is a public document, knowledge of the Board's procedures, experience with and responsibility for custody of the records of the Board, and actual presence at the afore-mentioned meeting, affiant states without qualification that the Board did not approve the internal staff memorandum and convert it into a final opinion and order, as claimed by the plaintiffs. The suggested wording of that portion of the memorandum entitled "Recommendation" was utilized by the Board and, with insignificant stylistic changes, was set forth in the letter to all plaintiffs dated April 12, 1968 * * *.

Compare N.L.R.B. v. Botany Worsted Mills, Inc., 106 F. 2d 263, 266 (C.A. 3, 1939):

> Because, however, a particular writer with or without acknowledgement adopts the exact or substantial phraseology of others, it does not follow that he has abdicated in favor of mental processes extrinsic to his own.

Since, therefore, the staff memorandum here involved is clearly an "intra-agency" memorandum, the next question under exemption (5), 5 U.S.C. 552(b)(5), is whether it would "be available by law to a party other than an agency in litigation with the agency." If not, then this internal staff memorandum is exempt from disclosure. As we

demonstrate below, the staff memorandum would be subject to a claim of privilege in litigation with the agency, and therefore would not be "available." Consequently, the Board's staff memorandum is plainly exempt from disclosure under exemption (5).

B. The Board's Internal Staff Memorandum would not "Be Available By Law To A Party Other Than An Agency In Litigation With The Agency."

1. At the outset, the exact nature and function of the Board's internal staff memorandum should be made clear. As stated in the affidavit of John M. O'Connell, Assistant Secretary of the Maritime Subsidy Board (App. 38):

> * * * [S]aid memorandum and attachments embody the statements and views of staff personnel of the Board. They set forth administrative bases for action, opinions of various staff officers and employees, and recommendations as to the action that should be taken by the Board.

The vital importance of the staff memorandum for the effective functioning of the Board is also detailed in Mr. O'Connell's affidavit, as follows (App. 38):

> Because of the important function of the staff memorandum in the administration of a program involving payments from the United States Treasury in the form of subsidy grants, it is imperative that it be a full and frank disclosure of all opinions and analyses ascertained by the numerous staff officers and employees. The Board cannot effectively perform its statutory function under the Merchant Marine Act, 1936, as amended, and administer its long-range (20 year) subsidy contracts <u>without having the benefit of such full and frank disclosure of the opinions and conclusions of its officers and employees</u>. Due to the institutional nature of the Board, it is necessary that such opinions and conclusions be set forth in writing. [Emphasis added.]

It should be emphasized that, in contrast to the opinions, analyses, etc., of subordinates, contained in the staff memorandum, which the Board has kept in confidence, the Board in this case has made available to plaintiffs all factual materials relating to "vessel manning scales," viz., in the words of plaintiffs' counsel, "a great mass of historical data relating to manning * * *" (supra, p. 7).

With the exact nature and function of the Board's internal staff memorandum clearly in mind, we turn now to a discussion of the applicable law.

2. It is well settled that documents in the hands of an executive agency, and containing recommendations, opinions and deliberations, are subject to a claim of Executive Privilege by the agency and thus not available through discovery procedures in litigation with the agency. For example, in Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F. 2d 654 (1960), a litigant attempted to obtain certain documents from the Renegotiation Board to aid it in its defense of an excess profit claim. This Court clearly distinguished between factual and non-factual material, holding (280 F. 2d at 660-661; emphasis added):

> To the extent that the documents deal with recommendations as to policies which should be pursued by the Board, or recommendations as to decisions which should be reached by it, the claim of privilege is well founded.
>
> * * * * *
>
> But the files of the Board may well contain investigatory or other factual reports * * * which are relevant to a determination of excess profits. Investigatory or factual reports not containing state or military secrets -- and the Government does not suggest that any such secrets are here involved -- have not ordinarily, without more, supported claims of privilege. [Footnote omitted.]

The same distinction was made by this Court in Machin v. Zuckert, 114 U.S. App. D.C. 335, 316 F. 2d 336 (1963), certiorari denied, 376 U.S. 896, where Machin sought the production of an entire Air Force investigative file relating to an accident. This Court there held that "a recognized privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued." 316 F. 2d at 339. (Emphasis added.) It went on to hold (id., at 339-340; emphasis added):

> The parties, in argument before us, have treated the investigative report as a unit that should either be entirely disclosed or entirely suppressed. From our review of the case, however, it appears to us that certain portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations. We refer to the factual findings of Air Force mechanics who examined the wreckage. [Footnote omitted.]

Accord, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C., 1966), affirmed per curiam sub nom. V.E.B. Carl Zeiss Jena v. Clark, "for the reasons stated in" the district court opinion, ____ U.S. App. D.C. ____, 384 F. 2d 979 (1967), certiorari denied, 389 U.S. 952:

> * * * [I]t is well established that the privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. [Footnote omitted.]

The reasoning behind this rule is apparent: the head of an executive agency must depend upon full and frank advice and recommendations from his subordinates, just as a judge often considers the frank opinion of his law clerk, and a legislator the unbiased reporting of his staff. If the subordinate were to suspect that, in some unforeseen litigation, his opinions would be made public (perhaps to the very persons who were the subjects of the communications to his superior), he might well tend to confine himself in the future to oral communications, or remain noncommittal and guarded in his opinions.

This reasoning has been clearly articulated in the cases. Mr. Justice Reed, sitting by designation in Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 945-946 (Ct. Cl., 1958), stated (emphasis added; footnote omitted):

> Here the document sought was intra-office advice on policy, the kind that a banker gets from economists and accountants on a borrower corporation, and in the Federal government the kind that every head of an agency or department must rely upon for aid in determining a course of action or as a summary of an assistant's research. * * * Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

> There is a public policy involved in this claim of privilege for this advisory opinion -- the policy of open, frank discussion between subordinate and chief concerning administrative action.
>
> When this Administrator came to make a decision on this $36,000,000 contract, with intricate problems of accounting and balancing of interest, he needed advice as free from bias or pressure as possible. It was wisely put into writing instead of being left to misinterpretation but the purchaser, plaintiff here, was entitled to see only the final contracts, not the advisory opinion.

Accord, N.L.R.B. v. Botany Worsted Mills, Inc., supra, 106 F. 2d at 267 (C.A. 3) (quoted supra, p. 15).

As the above-cited cases and analysis make clear, the kind of material sought by plaintiffs in this case would be subject to a claim of privilege in an ordinary discovery proceeding, and consequently "would not be available by law to a party other than an agency in litigation with the agency." It is thus within the literal language of exemption (5), 5 U.S.C. 552(b)(5). We will now show that this interpretation is supported by authority, is in accordance with the purposes of the Public Information Section of the Administrative Procedure Act as found in the legislative history, and is in fact the only reasonable interpretation of this exemption.

3. The only appellate court opinion involving exemption (5) is Freeman v. Seligson, ____ U.S. App. D.C. ____, ___ F. 2d ____, C.A.D.C. Nos. 20,478 and 20,482, decided June 28, 1968. In that case, a trustee in bankruptcy sought to examine Department of Agriculture files in order to obtain more information about the bankrupt's affairs. The trustee was upheld by the referee and the district court, but this Court reversed and remanded, laying down "the legal principles which the [district] court should then observe." Slip Opin., p. 7. With respect to certain documents, this Court noted that, in future proceedings, "privileges of certain types will be asserted," and therefore, "we should lay down general guidelines in this regard * * *." Id., at p. 19. With respect to the precise problem involved in the instant case, this Court in Seligson unanimously held (id., at pp. 19-20, and n. 70; emphasis added):

> Affidavits furnished by the Secretary assert that many of the papers sought * * * contain intra- and inter-agency advisory opinions and recommendations submitted for consideration in the performance of decision- and policy-making functions. This claim, if appropriately advanced and supported, would preclude disclosure of these documents. In Boeing Airplane Co. v. Coggeshall [supra, 280 F. 2d 654, 660], we held that recommendations as to Renegotiation Board decisions and policies were protected against normal production requirements. Later, in Machin v. Zuckert, [supra, 316 F. 2d 336, 339], we held similarly that memoranda reflecting recommendations and deliberations on Air Force policy were immune from revelation. Still more recently, V.E.B. Carl Zeiss, Jena v. Clark [supra, 384 F. 2d 979] affirmed without opinion a ruling that "the privilege obtains

with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." These decisions have, since the District Court's holdings in this case, been fortified by a clear expression of congressional policy to hold the line on disclosure of materials of this sort. 70/

70/ Pub. L. 89-487, 80 Stat. 250 (1966), effective July 4, 1967, as incorporated by Pub. L. 90-23, 81 Stat. 54 (1967), into 5 U.S.C. §552, is designed "to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements," with nine stated exemptions. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966). While inapplicable to this litigation, the history of this legislation reflects current congressional policy regarding public access to governmental records.

Within one exemption are "[i]nter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." 5 U.S.C. §552(e)(5) [sic -- this is the unofficial text; the citation should be "Section 3(e)(5) of P.L. 89-487"]. As the House report points out, "[a]gency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). See also S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1965).

The import of the Seligson decision is plain: exemption (5) displays a "clear expression of congressional policy to hold the line on disclosure of materials of this sort," i.e., those containing "advisory opinions, recommendations and deliberations" concerning agency action and policies. The legislative history cited by this Court shows conclusively that Congress was adopting the identical policy reasons for exemption (5) as those given by the courts in prohibiting discovery of non-factual agency memoranda when privilege is asserted by the agency involved. See Kaiser Aluminum & Chemical Corp. v. United States, supra. As we now show, other citations from the legislative history of the Act demonstrate the desire by Congress to secure this type of material from public inspection.

4. Exemption (5) made its first appearance as Section 3(c) of S. 1666, 88th Cong., 1st Sess. (1963), which exempted:

> the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters.

At the hearings held by the Senate Judiciary Committee in October, 1963, on S. 1666 and a related bill, a number of officials of government agencies emphasized the need for a broader exemption, including material dealing with policy matters regardless of whether adjudicatory or rule-making matters were involved. 12/

12/ Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess., October, 1963, e.g., pp. 202-203, 247.

On the other hand, a representative of the Maritime Administration Bar Association (attorneys who practice before the Federal Maritime Commission and Maritime Administration) urged that this exemption for internal memoranda "be modified so as to avoid confidential treatment of final staff recommendations and final staff summaries which are sent to the [Federal Maritime] Commission whether or not they deal with adjudicatory or rulemaking matters." 13/ The witness specifically advised the Committee of this Court's decision in Associated-Banning, et al. v. United States, No. 13,384, Order dated September 21, 1956, under which the minutes of the Federal Maritime Board are public, but "the staff memorandums and recommendations which [the witness claimed] underlie and explain the action are confidential." 14/

Instead of adopting the suggestion that the internal memorandum exemption be narrowed to permit the disclosure of staff memoranda in adjudicatory proceedings, the Congress acted on the Government suggestion that the exemption be broadened. Thus,

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13/ Senate Hearings, supra, n. 12, p. 130.

14/ Senate Hearings, supra, n. 12, p. 126.
In Associated-Banning, petitioners sought judicial review of an order of the Federal Maritime Board. The Board wrote no opinion explaining its decision. This Court's per curiam order dated September 21, 1956 (Prettyman, Bazelon, and Danaher, JJ.) ordered the Board to file, as part of the administrative record, the official minutes of the April 6, 1956 meeting at which the Board acted, but expressly excepted "material other than the foregoing, for example, internal staff memoranda and recommendations."

Section 3(c)(5) of the new version of the bill, reported favorably by the Senate Judiciary Committee, exempted:

> "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy.

In discussing this broader exemption, the Committee Report stated (S. Rep. No. 1219, 88th Cong., 2d Sess., 1964, pp. 6-7, 13-14):

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency [of] Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. All factual material in Government records is to be made available to the public, as well as final agency determinations on legal and policy matters which affect the public. [Emphasis in original.]
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> * * * * *
>
> Exception No. 5 would exempt "intraagency or interagency memoranda or letters dealing solely with matters of law or policy." This exemption was made upon the strong urging of virtually every Government agency. It is their contention, and one that the committee believes has merit, that there are certain governmental processes relating to legal and policy matters which cannot be carried out efficiently if they must be carried out "in a goldfish bowl." Government officials

> would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and co-workers if they knew that, at any future date, their opinions of the moment would be spread on the public record. The committee is of the opinion that the Government cannot operate effectively or honestly under such circumstances. Exception No. 5 has been included to cover this situation, and it will be noted that there is no exemption for matters of a factual nature. [Emphasis added.]

The Government's position in the instant case, that Congress intended to exempt memoranda containing opinions and recommendations as opposed to factual matters, is clearly supported, if not compelled, by the above congressional material. It was even more clearly brought out when Senator Humphrey suggested that the section be amended to exempt "matters of fact." He supported this suggestion by arguing that (110 Cong. Rec. 17667):

> As presently written clause (5) of the amended Section 3(c) appears not to exempt intra-agency or inter-agency memorandums or letters dealing with matters of fact. For example, clause (5) would apparently not exempt memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources. The knowledge that their views might be made public information would interfere with the freedom of judgment of agency employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5).

Senator Long's comment opposing this amendment was that it would

(id., at 17667-17668; emphasis added):

> result in a great lessening of information available to the public and to the press. Furthermore, the example cited with respect to intra-agency memorandums giving * * * the credibility of evidence obtained from witnesses or other sources, leads me to point out that there is nothing in this bill which would override normal privileges dealing with the work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public.

While the above material indicates that Congress intended to distinguish between fact and opinion in exemption (5), a fear was expressed that the wording "solely with matters of law or policy" would make the exemption inapplicable to a memorandum containing both facts and opinions. Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 89th Cong., 1st Sess., May, 1965, e.g., pp. 36, 205. Consequently, in S. 1160, 89th Cong., 1st Sess., 1965, the bill which was ultimately enacted into law, the exemption read (Section 3(e)(5)):

> inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency. 15/

15/ As enacted by P.L. 89-487, 80 Stat. 250, S. 1160 also defined "private party" as "any party other than an agency." Section 3(g), 80 Stat. 251. When the statute was codified by P.L. 90-23, 81 Stat. 54, this definition was incorporated into exemption (5) to give the present wording of 5 U.S.C. 552(b)(5), "available by law to a party other than an agency * * *."

In commenting on this exemption, the Senate Judiciary Committee stated (S. Rep. No. 813, 89th Cong., 1st Sess., 1965, pp. 2, 9; emphasis added):

> The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency.
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> * * * * *
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> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition * * *.

The House Government Operations Committee Report concurred (H.R. Rep. No. 1497, 89th Cong., 2d Sess., 1966, p. 10; emphasis added):

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

This report was used by this Court in Seligson in reaching its conclusion that Congress intended by exemption (5) "to hold the line on disclosure of materials" containing "'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Freeman v. Seligson, supra, Slip Opin., pp. 19-20, quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra. We know of no indication in the legislative history that Congress intended to make these items available in suits under this Act.

Any other reading of exemption (5) would render it a nullity. If both factual and opinion or conclusory material may be obtained under the Act, then all internal agency documents may be obtained. It might be suggested that the section be limited to prohibiting the disclosure of military or state secrets, since this category of documents also has been thought to be immune from discovery. See Boeing Airplane Co. v. Coggeshall, supra, 280 F. 2d at 660-661. However, such material is already exempt under 5 U.S.C. 552(b)(1), so that exemption (5) would be redundant if limited to this purpose.

For these reasons, this Court should adhere to its previous decision in Seligson, supra, and hold that the Board's internal staff memorandum is covered by exemption (5) since it would be privileged and thus not available "to a party other than an agency in litigation with the agency." That holding will best effectuate the purposes of the Act, as stated by President Johnson upon signing

it into law:

> Officials within the Government must be able to communicate with one another fully and frankly without publicity. * * *
>
> I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people.

2 Weekly Compilation of Presidential Documents 895 (July 11, 1966). 16/

5. Plaintiffs argue (Appellants' Brief, pp. 19 et seq.) that the Board's internal staff memorandum "would * * * be available" in litigation with the agency, because plaintiffs allegedly have a "need" for the document, and this "need" would, in a discovery proceeding, override the privilege which generally attaches to documents of that type. In other words, plaintiffs' argument seems to be that, although the Board's staff memorandum might not be available to a member of the general public (since he could not show such a "need"), plaintiffs have a superior right to compel production of the document. We show later (infra, pp. 39-45)

16/ An additional reason supporting the Government's position is the fact that it follows the authoritative administrative interpretation given the Act. See Udall v. Tallman, 380 U.S. 1, 16-17 (1964). The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June, 1967), drafted in "close consultation" with the House Subcommittee on Foreign Operations and Government Information, see 113 Cong. Rec. H 7459 (daily ed., June 19, 1967) (remarks of Congressman Moss), adopts the view (p. 35) that "opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups, remain exempt so that free exchange of ideas will not be inhibited." The guidelines in the Attorney General's Memorandum were approved by Congressman Moss, a leading proponent of the Act, as "positive and workable." 113 Cong. Rec. 7459, supra.

that plaintiffs cannot, in fact, demonstrate any compelling "need" which would entitle them, in a discovery proceeding, to override the normal privilege which attaches to internal governmental memoranda. However, as we first demonstrate, the glaring deficiency in plaintiffs' argument is that it assumes a construction of exemption (5) which is totally at odds with one of the fundamental purposes of the Public Information Section of the Administrative Procedure Act, as well as with its unambiguous language.

The former Section 3 of the Administrative Procedure Act provided for the disclosure of public records "to persons properly and directly concerned * * *." 5 U.S.C. 1002(c) (1964 ed.) By contrast, the new Public Information Section of the Administrative Procedure Act provides that public information and records shall be made available "to the public" and to "any person." 5 U.S.C. 552(a) and (c). The change was deliberate. As the House Committee on Government Operations stated, one of the major changes of the new law was that "It eliminates the 'properly and directly concerned' test of who shall have access to public records, stating that the great majority of records shall be made available to 'any person.'" H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 1 (1966). The new law, the Committee stated, recognizes "the basic right of any person--not just those special classes 'properly and directly concerned'--to gain access to the records of official Government actions." Id., at p. 5. Thus, the Committee emphasized, the new law "establishes the basic principle of a public records law by making the records available to any person." Id., at p. 8.

The Report of the Senate Judiciary Committee echoes this understanding of the new law, emphasizing that the new law:

> * * * eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know. [Emphasis added.]

S. Rep. No. 813, 89th Cong., 1st Sess., pp. 5-6 (1965).

Exemption (5), 5 U.S.C. 552(b)(5), is drafted in conformity with the basic principle that the new Act is a "Public Information" law. Exemption (5) provides that inter-agency or intra-agency memorandums or letters are exempt from disclosure unless they would be available by law to "a party" other than an agency in litigation with the agency. The words are not "the applicant" or "the party requesting disclosure." The focus, as in the Act generally, is not on the particular applicant but on an abstract person, "a party." In other words, exemption (5), in accordance with the other provisions of the Public Information Section of the Administrative Procedure Act, does not establish the test of whether a particular applicant, as distinguished from a member of the public generally, would be entitled to discovery because his particular need is great. Contrary to plaintiffs' assumption, therefore, the courts, in applying exemption (5), are not to look to the circumstances concerning the particular applicant, for that would result in a determination that one applicant is entitled to disclosure of a particular document under the new law, but another applicant is not entitled to the same document. As we have seen,

such a result is totally at odds with one of the basic purposes of the new law, as well as with its unambiguous meaning.

Instead, the meaning of exemption (5) is quite different and very clear. As seen above (pp. 27-34), Congress recognized that documents containing advisory opinions, recommendations and deliberations are subject to a claim of privilege and are not generally discoverable in litigation. And this Court ruled in Seligson, supra, that Congress, in enacting exemption (5), intended to "hold the line" on disclosure of materials of this sort. Freeman v. Seligson, supra, Slip Opin., pp. 19-20 & n. 70. The meaning of exemption (5), therefore, is clear and workable: if a document falls within the type of internal governmental material which would generally be subject to a claim of privilege, it is exempt from disclosure under the Public Information Section. The alternative approach suggested by plaintiffs would result in a discrimination between different applicants, is contrary to the unambiguous meaning of the Act, and would turn a proceeding under the Public Information Section into an accelerated discovery contest. 17/

17/ Compare exemption (7), 5 U.S.C. 552(b)(7), which exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." (Emphasis added.) As the House Committee emphasized in discussing this exemption, the Public Information Section "is not intended to give a private party indirectly any earlier or greater access to investigatory files that he would have directly in such litigation or proceedings." H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 11 (1966).

Our understanding of the meaning of exemption (5) is confirmed by the Report of the House Committee on Government Operations (H.R. Rep. No. 1497, 89th Cong., 2d Sess., 1966, p. 10); by the Attorney General's Memorandum, supra, at p. 35; and by the analysis of Professor Davis in "The Information Act: A Preliminary Analysis," 34 U. Chi. L. Rev. 761, 795-796 (1967). 18/

The foregoing analysis of the Public Information Section also demonstrates the fallacy in plaintiffs' contention (Appellants' Brief, pp. 25-26) that there is a "technical" deficiency in the Government's position on this appeal because no formal claim of Executive Privilege was asserted in this case. Such a technical defense would be relevant if this were an ordinary discovery proceeding in an ordinary litigation. 19/ But, as we have seen, an action under the Public Information Section is not an ordinary, accelerated, discovery proceeding. The proper forum for the Government's assertion of a formal claim of Executive Privilege, and for the plaintiffs' contrary contention that the privilege is outweighed by their "need," is not the district court in an action under the Public Information Section of the Administrative Procedure Act.

18/ These authorities point out that internal memoranda must be disclosed under exemption (5) if they "routinely" would be made available to a private party through the discovery process in litigation, and not otherwise. In other words, these authorities recognize that the question under exemption (5) is whether the document falls within the general class of material which would be subject to a claim of privilege and therefore would not ordinarily be available.

19/ Thus, in two such discovery contests, Pacific Far East Line, Inc. v. United States, Ct. Cl. No. 119-63 (App. 24-32) and Lykes Bros. Steamship Co., Inc. v. United States, Ct. Cl. No. 399-67, the Trial Commissioner ordered the production of the Board's staff memorandum "without prejudice" to the right of the Secretary of Commerce to file a claim of privilege (see App. 32).

Rather, those issues should, and may be, tried out in the course of the contract litigation between plaintiffs and the Board, e.g., in the Court of Claims, or (where the amount in controversy does not exceed $10,000) in the district court. Moreover, we know of no indication in the legislative history that Congress intended a formal claim of privilege to be necessary before exemption (5) comes into operation. The provision clearly refers to what "would * * * be available" in an ordinary suit where the agency is a party. As we have shown, memoranda containing opinions, recommendations, and conclusions would be privileged and thus not available in such a suit. Therefore, they are also not available in a suit under the Act.

6. As just seen, the question of whether or not a particular plaintiff would be entitled to production of a document in a discovery proceeding because his need outweighs a recognized privilege is wholly irrelevant to a determination of his right to compel production of the document under the Public Information Section of the Administrative Procedure Act. We now show that, in any event, plaintiffs cannot, in fact, demonstrate any compelling "need" which would entitle them to override the normal privilege which attaches to internal governmental memoranda. Preliminarily, it should be noted that it is doubtful whether, with respect to the kind of document here involved, viz., an internal staff memorandum consisting entirely of opinions, analyses, conclusions, and recommendations, the Government's claim of Executive Privilege can be

overcome by any showing of need. [20] However, we now demonstrate that there is, in fact, no substance in plaintiffs' assertion of "need" in this case. [21]

20/ In Boeing Airplane Co. v. Coggeshall, supra, and Machin v. Zuckert, supra, this Court did to some extent weigh the Government's need for confidentiality against the need for disclosure. However, it did this with respect to documents of a factual nature or reports from persons outside the Government. With respect to internal government documents dealing with recommendations as to policies which should be pursued or decisions which should be reached, this Court flatly held that such documents were privileged, without engaging in a weighing approach.

21/ Since plaintiffs cannot show any compelling "need" for the Board's staff memorandum, the various cases cited throughout Appellants' Brief are plainly inapposite. E.g., in Will Weiss, 155 Ct. Cl. 825 (1961), the Trial Commissioner found that the documents might well consist of factual material and appeared to have been prepared by individuals who had perpetrated a fraud. Although the Trial Commissioner recommended that the Government's privilege claim be rejected, he noted that the Government should not have to produce any document that "relates solely to intra-office advice on policy * * *" (id., at 847). The Court of Claims ordered the Government to produce documents for the Commissioner's in camera inspection, in view of his finding of "a prima facie showing of bad faith" (id., at 899).

In Bank of Dearborn v. Saxon, 244 F. Supp. 394, 402 (E.D. Mich., 1965), affirmed on other grounds, 377 F. 2d 496 (C.A. 6, 1967), the district court opened files of the Comptroller of the Currency because of the prima facie showing that his office had engaged in devices, "bordering on fraud," designed to "cloak an illegal act in the habiliments of legal propriety and good faith." And in Richard A. Weiss v. United States, 180 Ct. Cl. 863, 869-870 (1967), the court ordered production of a memorandum which was "utterly indispensable to the adjudication of this case on the merits." In this suit attacking the legality of plaintiff's discharge from the Navy, plaintiff contended that, contrary to Navy law, the responsible officials who ruled on his discharge did not have before them all documents reflecting on his fitness. The only evidence which indicated whether this contention was true or not, was a staff memorandum to a Navy Selection Board which, inter alia, summarized the available documents. The Court of Claims held that this document should be disclosed to plaintiff because of "compelling necessity" and "to avoid a miscarriage of justice."

In Timken Roller Bearing Co. v. United States, 38 F.R.D. 57, 63 (N.D. Ohio, 1964), the court found that the Internal Revenue reports were "reasonably calculated to lead to admissible evidence."

(continued)

First, plaintiffs erroneously assume that the internal staff memorandum to the Maritime Subsidy Board will "explain" its April 11, 1968, ruling. However, as we have shown (supra, pp. 18-19), the Board clearly did not "adopt" the staff memorandum and "convert" it into a Board decision. The official minutes of the Board's April 11, 1968, meeting, and the affidavit of the Board's Acting Secretary, conclusively establish that the Board simply referred to the "Recommendation" portion (pp. 27-31) of the memorandum as a matter of convenience, and that it did not adopt the opinions, analyses, etc., contained in the first part (pp. 1-26) of the staff memorandum. There is, in short, absolutely no basis for plaintiffs' assumption that the first part of the staff memorandum will "explain" the Board's April 11, 1968, ruling.

21/ (continued) Frazier v. Phinney, 24 F.R.D. 406 (S.D. Tex., 1959) was distinguished by the court in Unistrut Corp. v. United States, 37 F.R.D. 478 (E.D. Mich., 1965) on the ground that, in Frazier, the IRS assessed a deficiency against the taxpayer without telling him the section of the Code that was involved. In United States v. San Antonio Portland Cement Co., 33 F.R.D. 513 (W.D. Tex., 1963), discovery was permitted as to Internal Revenue reports which the Government had previously made public. In United States v. Proctor & Gamble Co., 25 F.R.D. 485 (D. N.J. 1960), the court agreed to hold an in camera inspection of documents which, it was alleged, would show that the Government was using a Grand Jury proceeding for purposes of a civil suit. In N.L.R.B. v. Capitol Fish Co., 294 F. 2d 868 (C.A. 5, 1961), the court held that an NLRB investigator might be examined on whether he had improperly influenced the testimony of witnesses before the Board. In DeLevay v. Reynolds, 19 Ad. L. 2d 677 (D.D.C., 1966), a suit for judicial review of the Patent Office's refusal to admit plaintiff to practice, it was held that the record should include (a) the examination questions, (b) plaintiff's answers thereto, and (c) the correct answers.

Second, there is no substance in plaintiffs' assertion (e.g., Appellants' Brief, p. 11) that they have been prejudiced by an enigmatic Board ruling. The letters sent to the plaintiffs on April 12, 1968 specified (1) those positions and wages on the affected vessels which the Board found were "fair and reasonable and necessary for the efficient and economical operation" of the ships, and (2) those other positions and wages which did not meet this standard, and which were "clearly improvident, unnecessary and excessive for the efficient and economical operation" of the vessels (App. 7-11). Thus, the Board clearly informed plaintiffs of its determination with respect to "vessel manning scales." That the plaintiff-shipowners, guided by experienced counsel, and expert in the provisions of the Merchant Marine Act, the ODS Manual, and their subsidy contracts (supra, pp. 2-8), fully understand the basis of the Board's April 11, 1968, ruling clearly appears from the 141 page "Brief for the petitioners on reconsideration" and the 152 exhibits which petitioners also filed with the Board.

Moreover, plaintiffs' rights simply do not depend on the Board's reconsideration proceeding. As noted above (p. 8, fn. 8), the Board's "manning" ruling is significant only insofar as it may affect plaintiffs' subsidy wage rates. Under Section 606(1) of the Merchant Marine Act, 46 U.S.C. 1176(1), the Board may determine a "readjusted" wage rate and offer it to the subsidized shipowner, who may reject it, and demand a "proper hearing" with respect to all components of the wage rate, including "manning." Nothing in the Act requires the Board to write a formal opinion explaining its initial determination

as to the proofered subsidy wage rate. Nor are plaintiffs' rights impaired by the lack of such a provision, for, under the Board's rules of practice and procedure (46 C.F.R. Part 201), the hearing is conducted in accordance with the safeguards of the Administrative Procedure Act, i.e., the subsidized operators and a Government representative each file pleadings which define the issues, adduce evidence, and present legal arguments to an impartial hearing examiner charged with the duty of preparing a recommended decision to the Board.

In other words, if the Board had refused to entertain plaintiffs' petition for reconsideration, plaintiffs would clearly have no ground for complaint since their rights with respect to subsidy wage r a t e s are independently protected by Section 606(1) of the Merchant Marine Act. It would be anomalous if the Board's favorable exercise of administrative discretion (i.e., its non-obligatory decision to reconsider its "manning" ruling) should provide plaintiffs with an excuse to "probe the mental processes" of the Board. The cases hold that such a violation of "the integrity of the administrative process" is not permitted. See United States v. Morgan, 313 U.S. 409, 422 (1941); 22/ Walled Lake Door Co. v. United States,

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22/ The Court stated (313 U.S. at 422):

> * * * [T]he short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Morgan v. United States, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18.

(continued)

31 F.R.D. 258 (E.D. Mich., 1962). See, also, Norris & Hirschberg, Inc. v. S.E.C., 82 U.S. App. D.C. 32, 36, 163 F. 2d 689, 693 (C.A.D.C., 1947), certiorari denied, 333 U.S. 867; 23/ and

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22/ (continued)

> Just as a judge cannot be subjected to such a scrutiny, compare, Fayerweather v. Ritch, 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. See Chicago, B & Q Ry., Co. v. Babcock, 204 U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. [Emphasis added.]

23/ The Court stated (163 F. 2d at 693):

> We come now to the petitioner's final contention that a summary or digest of the evidence, which the Commission had before it in considering the case, constituted the real "evidence" underlying the decision and that therefore the summary or digest should have been filed in the record. Whether the argument is valid depends upon the nature of the summary and the use to which it was put by the Commission. * * * Briefs, and memoranda made by the Commission or its staff, are not parts of the record. Our duty on appeal, being only to say whether the record justifies the order, is therefore only to examine the pleadings and the evidence. What may be said by counsel in their briefs, or by a commissioner or a subordinate in a memorandum concerning the record, does not properly come before us.

Associated-Banning, et al. v. United States, supra. It should not be permitted here.[24]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court should be affirmed.

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Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

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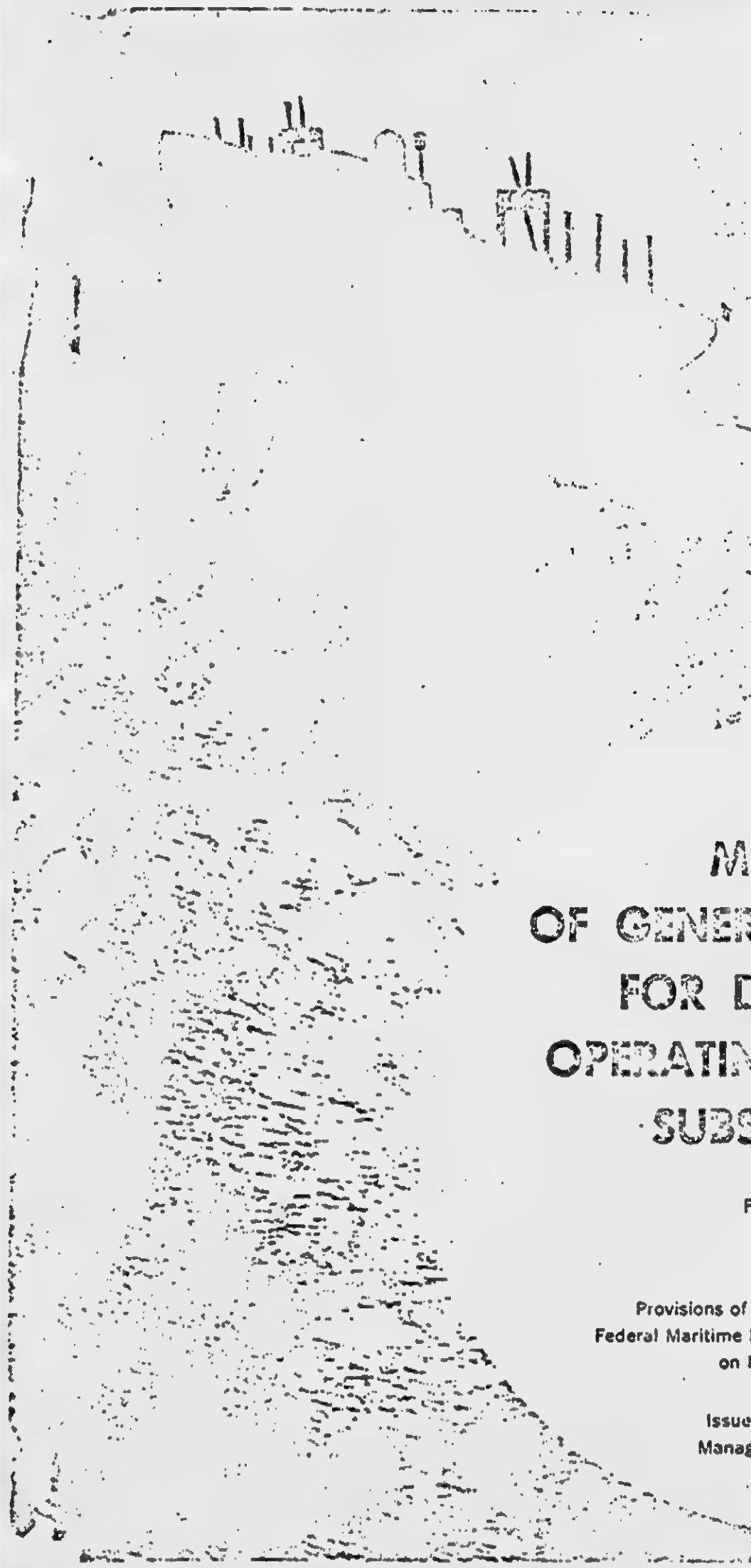
Washington, D. C. 20530.

SEPTEMBER 1968.

24/ It is unclear whether the plaintiffs are pressing in this Court their alternative request that the district court order the Board to supply them with a "statement of the reasons" for its April 11, 1968, ruling (App. 6). In any event, there is no basis for such relief. Since no "statement of the reasons" for the Board's ruling is in existence, its production under the Public Information Section of the Administrative Procedure Act can hardly be compelled. The Act speaks of a "request for identifiable records" (5 U.S.C. 552(a)(3)), and the authoritative administrative construction of the statute (see supra, p. 34, fn. 16) makes clear that this subsection refers to "records in being" and "imposes no obligation to compile or procure a record in response to a request." Attorney General's Memorandum, supra, at pp. 23-24. Accord, Bristol-Myers Co. v. F.T.C., D.D.C., Oral Opinion dated May 24, 1968, 36 U.S. Law Week 2762.



MANUAL OF GENERAL PROCEDURES FOR DETERMINING OPERATING-DIFFERENTIAL SUBSIDY RATES

First Revised Issue

Provisions of this Manual Approved by the
Federal Maritime Board and Maritime Administrator
on November 25, 1957

Issued Under Authority of
Management Order No. 630

FEDERAL MARITIME BOARD U. S. DEPARTMENT OF COMMERCE MARITIME ADMINISTRATION

U. S. DEPARTMENT OF COMMERCE

Sinclair Weeks, Secretary

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Maritime Administrator, Clarence G. Morse

Deputy Maritime Administrator, Walter C. Ford

Issued November 25, 1957

For sale by the U. S. Department of Commerce, Washington 25, D. C. Price $1.

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LEGAL BASIS FOR
OPERATING DIFFERENTIAL SUBSIDY

Title VI of the Merchant Marine Act, 1936, as amended, authorizes the Federal Maritime Board to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels which are to be used in an essential service in the foreign commerce of the United States. If the Federal Maritime Board approves the application, it may enter into a contract with the applicant for the payment of an operating-differential subsidy determined as follows:

> "* * * the amount of the operating-differential subsidy shall not exceed the excess of the fair and reasonable cost of insurance, maintenance, repairs not compensated by insurance wages and subsistence of officers and crews, and any other items of expense in which the Commission shall find and determine that the applicant is at a substantial disadvantage in competition with vessels of the foreign country hereinafter referred to, in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense * * * if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract."

In other words, operating-differential subsidy rates represent the percentage by which the fair and reasonable costs to a U. S. operator of operating a U. S. flag vessel with a U. S. crew exceed the estimated fair and reasonable cost to a foreign operator of operating the same vessel with a foreign crew under the registries of the substantially competitive foreign countries.

PREFACE AND GENERAL PROVISIONS

On September 26, 1951, the Federal Maritime Board and Maritime Administration adopted the Manual of General Procedures for Determining Operating-Differential Subsidy Rates. While certain of the procedures outlined therein remain in effect, others have been revised or amended and new procedures added by order of the Federal Maritime Board. The purpose of this issue is to place the Manual on a current basis and to effect certain improvements in rate-making techniques. Unnecessary effort has been eliminated and the methods of cost data collection and computation have been simplified and streamlined without sacrificing any of the essentials necessary to comply with the Merchant Marine Act, 1936, as amended.

The Federal Maritime Board/Maritime Administration reserves the right to revise or modify this Manual of General Procedures, and will continue to expand and revise it (in accordance with requirements of law) whenever it is possible to develop further improved methods or refinements. Advice and cooperation along these lines from all interested parties are solicited.

The prescription of these procedures is without prejudice to the Federal Maritime Board/Maritime Administration's evaluation of the data reported or the application of applicable legal standards to the facts of any individual subsidy rate calculation thereunder.

In preparation of this Manual, the Federal Maritime Board/Maritime Administration has been governed by the provisions of the Merchant Marine Act, 1936, as amended, in determining "fair and reasonable" estimates of cost. It is believed that these revised

procedures will result in the establishing of permanent rates for the years involved, on a current basis, with due justice to the position of both the Federal Government and the Industries affected by operating-differential subsidy rate determination.

The purpose of the adoption of this Manual by the Federal Maritime Board/Maritime Administration is twofold:

1. To establish the factual bases by which the Federal Maritime Board/Maritime Administration shall calculate operating differential subsidy rates.
2. To delineate the areas of cooperative effort between the Federal Maritime Board/Maritime Administration and the subsidized operators with regard to the collection of data on United States and foreign-flag operating costs and practices, the preparation of comparative studies, and other relevant details.

The provisions of the Manual which require that subsidized operators shall furnish foreign cost data shall not be deemed mandatory because of the inherent difficulty of obtaining data on foreign costs. The subsidized operator shall make every reasonable effort to obtain and submit to the Board-Administration foreign cost data useful for calculating operating-differential subsidy rates. Where an operator finds that the collection and submission of such data can be more efficiently or economically performed by group representation (such as the Labor-Management Maritime Committee) it may do so.

A separate part in this Manual (including reporting requirements) is devoted to each of the subsizable items of expense.

The various parts presented herein are uniform in arrangement, outlining the source and nature of United States and foreign cost data, and the procedure for establishment of the United States and foreign flag costs for cost comparison, accompanied by illustrations and sample computations where necessary.

The following specific requirements are applicable to all types of subsidy rates and are listed to avoid repetition in each part:

1. Effective Dates of Operating-Differential Subsidy Rates

All rates shall be computed on a calendar year basis regardless of the date of entry of a vessel in the subsidized service or the inauguration of a new service. In the case of a new service, new operator, or new combination and passenger vessel, subsidy rates effective for the first calendar year of subsidized service or part thereof, shall be based upon the cost experience, weighted average foreign exchange rates, competition weights, and other factors for that year, upon the determination that the period of subsidized service is sufficient in scope to produce adequate and representative United States cost experience for that year. Such rates will also apply to the full calendar year subsequent to the first or partial year of subsidized operations.

All rates shall be reviewed and adjusted as of January 1st of each year, except in the case of mutual agreement between an operator and the Federal Maritime Board, and except as provided above with respect to new services, new operators, or new combination and passenger vessels.

The subsidy rates for any calendar year shall apply to approved voyages terminated within that calendar year.

2. Negative Operating-Differential Subsidy Rates

The percentage amount of the differential, whether negative or positive, will be computed. When an operating-differential subsidy rate in any category of expense is less than zero, indicating that the subsidized operator is at an advantage rather than a disadvantage in such category, the money equivalent of such rate shall be deducted from the money equivalent of other subsidy rates found to be due the subsidized operator in the same calendar year involved.

3. Basis for Cost Calculations

Subsidy rates effective January 1 of each year will be based upon the cost experience, weighted average foreign exchange rates, competition weights, and other factors for the previous year (except as provided in Item 1, above, with respect to new services, new operators, or new combination and passenger vessels, and except as provided hereinafter with respect to the particular average experience applicable to subsidy rates for hull and machinery insurance).

4. Foreign Flag Competition

The foreign flag competition approved by the Federal Maritime Board for each essential trade route and/or service shall be used in all calculations for the subsidy cost year involved.

5. Foreign Exchange Rates

Weighted average foreign exchange rates for the subsidy cost year concerned, as recommended by the United States Treasury Department, shall be used in converting foreign currency into the United States currency equivalents.

6. Cut-Off Date for Receipt and Use of Data

September 1st of each year is the cut-off date for the receipt and use of data in calculating operating-differential subsidy rates for such year. Data received by the Maritime Administration on or after such date will not be used in the calculation of operating-differential subsidy rates for that particular year unless, in the opinion of the Federal Maritime Board, the data on hand as of such cut-off date are inadequate to establish a fair and reasonable rate.

7. Predominant Foreign Competitor

The predominant foreign competitor shall be determined for each principal competitive foreign flag on each essential trade route and/or service. Its estimated fair and reasonable costs, if obtainable, shall be considered to be representative of all competitors under that flag; otherwise, to the extent that costs are not obtainable, the principal foreign competitors, in order of importance, shall be used in the computation of subsidy rates. The basis for the determination of the predominant foreign competitor or the principal foreign competitors shall be the foreign competition approved by the Federal Maritime Board. For purposes of the foregoing, the predominant foreign competitor or the principal foreign competitors shall be determined from the cargo and/or passengers carried, as appropriate, as reflected by the approved foreign competition referred to above.

Where such predominant foreign competitor is identified as an operating agent or a joint venture in which several lines are operating under the name of such agent or joint venture, the predominant foreign competitor shall be the line whose vessels carried the most cargo and/or passengers under the name of said agent or joint venture.

8. Effective Date

This Manual is issued as a part of the Manual of Orders of the Federal Maritime Board/Maritime Administration under Management Order No. 630 of November 25, 1957. The reporting requirements of these procedures have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942. All provisions of this manual are effective January 1, 1956, except Part IV which shall be effective January 1, 1955, and Section VI, Part Seven, shall be effective January 1, 1958.

PART ONE | Wages of Officers and Crews

Section I—Procedure for Determining Vessel Manning Scales

I. PREDOMINANT TYPE VESSEL—CARGO

Manning scales shall be computed for the predominant type cargo vessel in each service. For this purpose, the predominant type cargo vessel shall be determined from the number of terminated voyages eligible for subsidy in the year preceding the subsidy rate year involved. In the event that the number of voyages are the same for the different vessel types, then the type vessel which was utilized for the greatest number of terminated voyage days in the preceding year shall be deemed to be the predominant type.

II. OTHER VESSELS

Manning scales for combination and passenger vessels will be established individually for each type of vessel concerned.

III. SOURCES AND NATURE OF BASIC DATA REQUIRED

A. United States Manning

1. Subsidized Operators

A crew list on Immigration and Naturalization Service Form I-418, and supplements thereto, if any, duly certified by the appropriate Collector of Customs for each voyage of a subsidized vessel.

2. United States Coast Guard

When verification is required, checks shall be made of the subsidized vessel's actual crew complement from original shipping articles filed with the United States Coast Guard.

3. United States Immigration and Naturalization Service

When verification is required, checks shall be made of Alien Crew Declarations filed with the United States Immigration and Naturalization Service.

B. Foreign Manning

1. Subsidized Operators

Estimated manning scales for each type of subsidized vessel in its service, detailing how each such type vessel would be manned if such vessel were operated by the predominant foreign competitor under the competitive foreign flag in the subsidized service. Support for such estimate is required, indicating source from which

derived; e.g., opinion of a competitive foreign flag operator, analysis of comparable vessels under foreign flag registries, etc.

2. Foreign Flag Ship Operators

   Itemized manning scales of officers and crew normally employed aboard vessels selected as comparable to United States subsidized vessels.

3. United States Immigration and Naturalization Service

   Originals or copies of Alien Crew Declarations (Form I-418) filed with the United States Immigration and Naturalization Service.

IV. PROCEDURE FOR ESTABLISHING MANNING SCALES FOR SUBSIDIZED VESSELS

A. United States Manning

The basic data used shall be the normal crew complement utilized by the subsidized operator in each trade route or service, adjusted to the extent deemed necessary by the Federal Maritime Board in order to determine fair and reasonable wage costs.

B. With a Foreign Crew

The basic data used shall be the manning scales for each competitive foreign flag, and the manning practices of the predominant foreign flag competitors, as developed through an examination of alien crew manifests, advices received from the Maritime Foreign Representatives, and estimated manning scales furnished by subsidized operators.

Precedence shall be given to the use of manning scales in the following order:

1. Vessel(s) of the predominant foreign competitor under each competitive foreign flag in the same service.
2. Vessel(s) of other direct competitors under each competitive foreign flag in the same service.
3. Vessel(s) of the predominant or other direct foreign competitors of the same competitive foreign flag but operated in another service.

Adjustments shall be made for the differences in physical characteristics between the foreign flag vessel and the subsidized vessel and for the differences in manning practices of the predominant foreign competitor. Substantially comparable department(s) of vessel(s) operated by non-competitive operator(s) under the same competitive foreign flag may be used as a guide in estimating adjustments for the differences in physical characteristics between the vessel of the foreign competitor and the subsidized vessel.

For cargo vessel manning, where the vessels of the predominant foreign competitor are manned with all white crews and mixed crews, the manning shall be based upon the predominant type crew. For this purpose, the predominant type crew shall be determined from the number of competitive sailings as reflected by the foreign competition approved by the Federal Maritime Board. If the number of competitive sailings are the

same for the different crew types, then the tons of cargo carried aboard these vessels shall determine the predominant type.

After all adjustments are made, a manning scale shall be developed for the subsidized predominant type cargo or other type vessel operated in an essential trade route or service under each competitive foreign flag.

Where manning under a foreign flag cannot be estimated with reasonable substantiation, then the manning shall be deemed to be identical with that of the subsidized vessel.

Section II—Procedure for Determining an Operating-Differential Subsidy Rate for Wages of Officers and Crews

I. SOURCES AND NATURE OF BASIC DATA REQUIRED

A. United States Costs

1. Subsidized Operators

Reports of vessel wage costs, as required by General Order No. 12, Revised, Supplement No. 2.

2. Shipping Associations or Committees

Copies of all collective bargaining agreements, addenda, and/or amendments thereto, as well as arbitral awards, as concluded between operators and the applicable maritime labor organizations, or otherwise promulgated.

3. United States Coast Guard

Shipping articles which show wages for all personnel aboard ship not covered by existing collective bargaining agreements, as well as other specified conditions of employment.

B. Foreign Costs

1. Subsidized Operators

Such data as United States subsidized operators are able to obtain on foreign wage costs.

2. Foreign Flag Ship Operators

Operating cost experience data (base wages and increments thereto).

3. Foreign Government Agencies

Public documents arising out of national legislation, decrees, regulations and other official actions, together with amendments thereto, which affect costs incident to the employment of seagoing personnel.

4. Collective and Private Maritime Agreements

Copies of all collective bargaining agreements, addenda, and/or amendments thereto, as well as arbitral awards, as concluded between foreign flag ship operators and the applicable maritime labor organizations, or otherwise promulgated.

II. CALCULATION OF SUBSIDY RATE

A. Fair and reasonable United States monthly wage cost estimates shall be computed for each subsidized predominant type cargo vessel, combination vessel, and passenger vessel, as required, operated in an essential trade route or service.

B. Fair and reasonable foreign monthly wage cost estimates shall be computed for each subsidized predominant type cargo vessel, combination vessel, and passenger vessel, as required for each foreign flag determined to be a substantial competitor in that service, if such vessel were operated by the predominant foreign flag competitor under foreign registry.

C. The base wage rates used shall be those in effect on January 1st of the year prior to the subsidy rate year involved; e.g., the base wage rates used in calculating wage subsidy rates applicable to the calendar year 1956 would be those in effect on January 1, 1955. The same principle shall be applied to pension, welfare and unemployment fund contributions.

D. Unweighted Differential

The United States and foreign monthly wage costs shall be compared to obtain the differential in dollars and percent of United States costs.

E. Composite Weighted Differential

The unweighted differentials, by flag, shall be weighted by the degree of competition of each principal foreign flag on the trade route and/or service. Negative differentials shall be applied as an offset against positive differentials in order to arrive at a composite weighted differential subsidy rate.

III. EXAMPLE OF SUBSIDY RATE CALCULATION FOR CARGO VESSELS

The following Exhibit 1 is an example of a subsidy rate calculation for cargo vessels. It is assumed in this example that substantial competition was offered by:

Netherlands.....	35%
Norway.....	20%
United Kingdom.....	45%
	100%

EXHIBIT 1

SAMPLE CALCULATION—ABC STEAMSHIP COMPANY, INC.

DETERMINATION OF WAGE DIFFERENTIAL SUBSIDY RATE

C-2 CARGO—TRADE ROUTE X

	United States	Nether-lands	Norway	United Kingdom
Number in Crew	50	55	44	52
Percentage of Overtime to Base Wages	37.22%	20.39%	22.31%	15.35%
Base Wages	$16,900	$4,340	$4,052	$4,240
Overtime	6,290	885	904	651
Vacation (Leave)	850	602	504	429
Area and Miscellaneous Bonuses and Other Allowances	-	880	1,179	196
Repatriation	-	-	350	-
Social Security	590	899	247	117
Welfare, Pension and Unemployment Fund Payments	650	501	170	70
Total Monthly Wage Costs	$25,280	$8,107	$7,406	$5,703
Differential—Excess of U. S. Cost over Foreign		17,173	17,874	19,577
Unweighted Differential		67.93%	70.70%	77.44%
Competition Weight Factor		35.0 %	20.0 %	45.0 %
Weighted Differential		23.78%	14.14%	34.85%
Composite Weighted Differential			72.77%	
		Fl.	Kr.	£
Foreign Exchange Rates		$0.263158	$0.1400	$2.80

PART SEVEN | Definitions of Subsidizable Items of Expense

Section I—Wages of Officers and Crews

Wages consist of the fair and reasonable cost of payments made by the operators directly to or for the benefit of (to the extent indicated below) members of the crew complement and relief complement of subsidized vessels for services rendered and required for the efficient and economical operation of such vessels, provided that they are not recoverable from shippers, receivers or other third parties.

Crew complement shall be construed to mean, in addition to the master, those officers and ratings approved by the Federal Maritime Board as being eligible for rate-making purposes. Relief complement shall be construed to mean those officers and ratings assigned to relieve in port members of the crew complement.

A. PAYMENTS ELIGIBLE FOR RATE-MAKING AND SUBSIDY PAYMENT PURPOSES

1. Base Wages.
2. Overtime, including penalty time pay.
3. Vacation pay (earned in subsidized services) including contributions to union vacation funds.
4. Penalty cargo bonuses.
5. Area bonuses.
6. Non-watch pay.
7. Tool allowances.
8. Pension, welfare and unemployment fund contributions.
9. Payroll taxes.
10. Clothing allowances, as distinguished from uniform allowances.
11. Payments to Masters and Chief Engineers for shifting ship.
12. Passenger allowances to Stewards Department on freighters.

B. PAYMENTS ELIGIBLE FOR SUBSIDY PAYMENT PURPOSES ONLY

1. Travel expenses (except subsistence allowances) representing the cost of crew replacements or returning crew to port at which articles are signed.
2. Relief officers and ratings to the extent of items set forth under A above.

C. PAYMENTS INELIGIBLE FOR RATE-MAKING AND SUBSIDY PAYMENT PURPOSES

1. Uniform allowances, as distinguished from clothing allowances.
2. Unclaimed wages (ineligible for subsidy payment purposes only).

3. Commissions on sale of liquors (bar bonuses).
4. Gratuities or gifts.
5. Payments (such as 50¢ per meal) and overtime to Stewards Department personnel for serving meals to other than crew and relief complement, passengers and persons necessary to the efficient and economical operation of the vessel, i.e., pilots, immigration, customs officials, etc., actually working the vessel.
6. Payments of any kind to crew or relief complement who are represented in union collective bargaining agreements which are in excess, either in nature or amount, of that specified and required in such agreements shall not be allowed, unless specifically authorized by the Federal Maritime Board.
7. Payments of any kind to crew or relief complement who are not represented in union collective bargaining agreements which are in excess, either in nature or amount of that specified for like personnel in comparable agreements, shall not be allowed, unless specifically authorized by the Federal Maritime Board.
8. Payroll taxes (except on unclaimed wages) related to any payments disallowed under the definitions hereinabove stated.

Section II—Subsistence of Officers and Crews

Subsistence consists of the fair and reasonable net costs of meals and meal allowances furnished to crew and relief complements as defined under wages of officers and crews.

The definition of the word "domestic" as used herein shall refer to the "United States" as defined in Section 505(a) of the Merchant Marine Act, 1936, as amended.

A. COSTS ELIGIBLE FOR RATE-MAKING AND SUBSIDY PAYMENT PURPOSES

1. Net costs of food and other edibles consumed are eligible for rate-making; however, that portion of purchases other than domestic which is included therein is ineligible for subsidy payment purposes.
2. Sales taxes.
3. Government inspection.
4. Shipside delivery costs except those incurred by crew and relief complement.

B. COSTS ELIGIBLE FOR SUBSIDY PAYMENT PURPOSES ONLY

1. Subsistence allowance for meals ashore when it is impracticable to serve meals aboard the vessel.
2. Subsistence allowances which are directly attributable to crew replacements or returning crew to port at which articles were signed.
3. Loading costs (domestic) when loading is performed by other than crew and relief complement.

U. S. DEPARTMENT OF COMMERCE
FEDERAL MARITIME BOARD
Washington, D. C.

Office of the Secretary — January 10, 1958

L25-23:620

TO ALL SUBSIDIZED OPERATORS
(See Attached List)

Gentlemen:

Subject: Manual of General Procedures for Determining Operating-Differential Subsidy Rates, First Revised Issue

Under date of November 25, 1957, the Federal Maritime Board and Maritime Administrator approved the provisions of the subject Revised Manual for Determining Operating-Differential Subsidy Rates.

A copy of said Manual is enclosed herewith for your information. Additional copies are available for purchase from U. S. Department of Commerce, Office of Publications, Commerce Building, Washington 25, D. C., at the price of $1.00 each.

Very truly yours,

/s/ James L. Pimper

James L. Pimper
Secretary

Enclosure

cc: 013
020
104 (Mr. Schweizer)
600
620
762
Mr. Purdon, CASL
Washington Reprs. of Subsidized Operators (letter only)

TJaffe:fml

List of Subsidized Operators

QM32	American Banner Lines, Inc.
QM8	American Export Lines, Inc.
QM13	American Mail Line Ltd.
QM17	American President Lines, Ltd.
QM727	Bloomfield Steamship Company
QM77	Farrell Lines Incorporated
QM91	Grace Line Inc.
QM97	Gulf & South American Steamship Co., Inc.
QM118	Lykes Bros. Steamship Co., Inc.
QM126	Mississippi Shipping Company, Inc.
QM128	Moore-McCormack Lines, Inc.
QM155	The Oceanic Steamship Company
QM166	Pacific Far East Line, Inc.
QM227	States Steamship Company
QM245	United States Lines Company

U. S. DEPARTMENT OF COMMERCE
FEDERAL MARITIME BOARD
MARITIME ADMINISTRATION
Washington, D. C.

Office of the Secretary
L25-23:621

November 9, 1960

TO ALL SUBSIDIZED OPERATORS
Circular Letter No. 8-60

Re: Determination of "Fair and Reasonable" under Section 603(b), Merchant Marine Act, 1936, as amended

Gentlemen:

As the result of concessions made by the employers, for one reason or another, provisions have come to be incorporated into the several Maritime Collective Bargaining Agreements which have had the net effect of spiralling vessel operating costs in the last several years. In addition to the granting of periodic increases in base wage rates at relatively frequent intervals, agreements have been reached to augment manning complements of vessels which had operated safely and efficiently for many years with less personnel. Opportunities for earning overtime and penalty pay, in many instances for work actually performed during the regular tour of duty of the individual crew member involved, have been expanded. Vacation allowances and payments have been liberalized while, on the other hand, limitations in the scope of the duties to be performed by a specific rating have become increasingly restrictive. Various programs, e.g., training, food, medical, et al., have been instituted and implemented and substantial increases have been negotiated in the contributions to the several Welfare and Pension Funds.

Under Section 603(b) of the Merchant Marine Act, 1936, as amended, it is the duty of the Federal Maritime Board to determine that items of vessel operating expense for which subsidy is paid are "fair and reasonable." The mere fact that the item of expense is covered by a contract or collective bargaining agreement does not, ipso facto, make it "fair and reasonable." The Federal Maritime Board, therefore, at a meeting held on October 10, 1960, directed that each subsidized operator be advised that the Board will not accept, without due explanation and complete justification, increases or concessions on the part of the subsidized operators resulting from future collective bargaining, as fair and reasonable.

To All Subsidized Operators
Circular Letter No. 8-60

11/9/60

The fact that the United States Government is bearing a substantial portion of the cost of wages and other operating expenses in the form of subsidy is not to be construed as relieving the subsidized operator of its basic responsibility to bargain diligently and prudently with the several Maritime Unions nor as a cause for relaxation of its efforts to maintain operating costs at a minimum level, consistent with the safe, efficient and economical operation of the subsidized vessels.

Very truly yours,

/s/ Thomas Lisi

Thomas Lisi
Secretary

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
Washington, D. C.

TO ALL SUBSIDIZED OPERATORS

December 13, 1961

CIRCULAR LETTER NO. 17-61

L25-23:621

Gentlemen:

Subject: Basic Policy with Respect to Obtaining Board Approval for new Manning Scales, Additions to Crew, Changes in Status and Spot Increases in Wages of Crew Members on a Permanent Basis

The Maritime Subsidy Board, on December 1, 1961, adopted the following policy with respect to manning and wages of all subsidized ships:

I. The detailed manning scale of the crew on any newly constructed ship which enters into subsidized service on or after January 1, 1962, shall be submitted to the Maritime Subsidy Board for approval, and only those officers and ratings approved therein shall be eligible for subsidy rate-making or subsidy participation purposes.

II. Effective as of January 1, 1962, any and all additions of officers or unlicensed ratings to the existing normal manning scale of any subsidized ship, or the upgrading of any officer or unlicensed crew member, or the granting of spot increases in base wages to any member of the crew, all on a permanent basis, or any payments to any crew member made by the operator "under protest", shall be submitted to the Maritime Subsidy Board for approval and only those costs approved therein shall be eligible for subsidy rate-making or subsidy participation purposes.

III. Submission to, and request for Maritime Subsidy Board approval for any of the above manning scales, additions, changes in status or increased wages shall be made only after such matters have been finalized by the operator.

To All Subsidized Operators
Circular Letter No. 17-61

12/13/61

Your attention is directed to the provisions of Section 7 of Department of Commerce Order No. 117 (Revised), effective August 12, 1961.

Sincerely yours,

/s/ James S. Dawson, Jr.

James S. Dawson, Jr.
Secretary

USCOMM-MA-DC

cc: 100,101,115,116,600,620,621,623-9,630-2,640,400,430-3,200,210, 10002,10003,10004-14,40002,40003,40004,60002,60003,60004, 539-2,512(PLF),CASL,Wash.Rep.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,091

AMERICAN MAIL LINE LTD., et al.,
Appellants,

v.

JAMES W. GULICK, et al.,
Appellees.

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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APPEAL FROM ORDER OF THE UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

It seems to us important to sketch the principal issues between the parties as drawn in the respective briefs, for we believe the Government's case comes down in the end to rest upon assertions about the course of subsidy administration which it cannot defend. After sketching the broad framework of the issues posed by the briefs we shall make summary comment on specific errors or omissions in the Government's brief.

A. The Issues As Framed by the Parties

Plaintiffs rely on the broad purposes of the Freedom of Information Act to prevent secret government. The Government brief ignores these broad purposes and elaborates

upon the exception of § 552(b) (5). If that exception is inapplicable, it is immaterial whether the staff memorandum upon which the Board acted is considered as "statements of policy and interpretations which have been adopted by the agency" [§ 552(a) (2) (B)], or as "instructions to staff that affect a member of the public" [§ 552(a) (2) (C)], or as "identifiable records" [§ 552(a) (3)]. In whichever category, the memorandum must be produced. The narrow issue, then, relates only to the reach of the intra-agency memorandum exception of § 552(b) (5), which applies indifferently to all categories covered by § 552(a).

We urge that the Board necessarily accepted the staff memorandum, which alone was before it when it acted, by copying out its five concluding pages as its own order. If so, the memorandum was no longer "intra-agency" but one with a most serious external impact. The Government urges, to the contrary, that as the Board did not formally adopt or approve 1-26 of that memorandum when it copied out pages 27-31, so the first 26 pages of the memorandum remain an internal staff communication (*infra*, pp. 12-13).

If the Government is correct, then we can obtain access to the memorandum only if it is "available by law to a party other than an agency in litigation with the agency." We say that as the litigation over this decision could arise only in the Court of Claims, its decisions requiring production of indistinguishable staff memoranda to this same Board are conclusive. The Government virtually ignores the Court of Claims cases (*infra*, pp. 15-16). It urges instead that the courts generally have sustained the executive privilege with respect to staff memoranda of law, or policy, or bearing on the decisional process. It recognizes that the privilege is overcome when the litigant shows sufficient need for the document. We believe that the courts have invariably ordered the production of staff memoranda when they offer the only explanation of the agency action (*infra*, 16-17). The difference in analysis of the general law is immaterial if plaintiffs have in fact shown a sufficient need for the mem-

orandum to overcome what the Government considers to be the privilege otherwise obtaining.[1]

We consider it self-evident that one has a need for knowledge of the reasons for an agency decision when he seeks reconsideration. This the Government does not deny but asserts instead that the decision is unimportant since (a) it has effect only in the process of subsidy rate-making and (b) we have a statutory hearing under § 606(1) of the Merchant Marine Act, giving full Administrative Procedure Act protections, if dissatisfied with that subsidy rate. Both of these propositions are flatly and indisputably wrong. If that be recognized, it seems to us that there is no issue between the parties. As we have an unrefuted need, so the "internal memorandum" privilege would be overridden in litigation with the agency and thus is not covered by the exception § 552(b) (5). We do not know what arguments the Government would have advanced if it had understood the process of subsidy administration and the course of Board decisions in § 606(1) hearings. But on the arguments it has made, there does not seem to us to be a real issue before the Court.

B. The Board Decision

The Government brief contains an unusual amount of unsupportable misinformation about the procedures of the Maritime Subsidy Board and the effect of the unexplained decision which led to our demand for its reasons. We offer our corrections arranged according to the sequence of steps in the decisional process.

1. *Notice.* The Government asserts that there is no substance in our assertion that we had no notice that the issue was under consideration by the Board, and that we were accordingly unable to make submission of our case [Br. 12].

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[1] We pass over, as unsupportable, the further Government contention that § 552(b)(5) looks only to the rights of the general public and not to those of a particular litigant with the agency (*infra*, pp. 13-15).

It did not undertake in the District Court to contradict this allegation of the verified complaint [J.A. 3], and should not be heard to do so here, especially when the only support cited for its statement is a general reference to three pages of narrative [Govt. Br. 6-8] which contains no statement that the operators in fact had notice that the issue was under Board consideration.[2]

2. *Basis of Board Action.* The affidavit of the Board's Assistant Secretary states that the Board, when it made its April 11, 1968, disallowance, had nothing before it except the staff memorandum and its attachments [J.A. 348]. It "considered" that memorandum and "found and determined" in *haec verba* the five pages constituting the recommending portion of that memorandum [J.A. 65]. In view of "the institutional nature of the Board" [J.A. 38], it would strain credulity to believe that it did not accept and approve the reasons advanced in that memorandum for the concluding recommendations. At the least a specific and forthright denial would be required to rebut that probability. The affidavit of the Assistant Secretary somewhat artfully avoids that specific denial. It states, generally, that upon receipt of *a* staff memorandum the Board "may ac-

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[2]That narrative does refer to our "pending applications for approval" of manning scales, which in turn dervies from the affidavit of the Board's Assistant Secretary, speaking of "pending requests," [JA 37] and the Government's statement of material facts, speaking of "requests" [JA 34] which statements we had accepted [JA 69]. Any inference from the term "requests" that we knew the issue was pending before the Board would surely require that the dates of the so-called "requests" be given, and surely could not survive the uncontradicted fact that subsidy vouchers have been presented and paid—necessarily implying "approval" of the manning—ever since the vessels entered service beginning in 1961 [JA 3]. If we were permitted to follow the Government's practice of going outside the record [Br. 5, 12], we would advise that American President Lines on May 10, 1960, and Pacific Far East Line on June 10, 1960, simply reported their manning scales without any request for any form of approval while American Mail Line on June 3 and September 28, 1962, concluded its one page letters with a request for approval.

cept the contents and opinions thereof, may arrive at different conclusions than those suggested, or may reject the entire memorandum and/or direct further study" [J.A. 38]. From this generalized description of the Board's alternatives, the affidavit concludes that "the memorandum is not adopted" even though its suggested format is utilized. In this particular instance, the Board obviously did not "arrive at different conclusions than those suggested" and did not "reject the entire memorandum." It obviously followed the first alternative given in the affidavit and elected to "accept the contents and opinions thereof." It is a verbal quibble whether this amounted to adoption rather than acceptance.

3. *Finality of Decision.* The Government seems to believe its case to be advanced by describing the Board's decision as an "initial determination" [Br. 42] or as "intermediate" [Br. 8]. This characterization rests upon assertions that the action is relevant only in a subsequent determination of a subsidy rate, after which the operators may if dissatisfied demand and receive a statutory hearing under § 606(1) of the Merchant Marine Act. This is an inexplicable departure from the actual procedures of the Board.

(a) U.S. manning is determined for purposes of subsidy rates only for the "predominant" vessel of the operator on the service in question.[3] It is on the face of the matter improbable in the case of the two plaintiffs who have only two vessels affected [J.A. 4], that these could ever be their "predominant" vessel.[4] In that case the manning scales can never figure in subsidy rate-making, nor under the Government's theory become the subject of a Section 606(1) hearing, for those plaintiffs.

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[3] "Manual of General Procedures for Determining Operating Subsidy Rates," Maritime Administration, Part One, § I [Gov't Br. 11a].

[4] If we were to go outside the present record, we would find that in 1963 and 1964 these C-4 vessels were "predominant" for one service of American President Lines but have not been so for Pacific Far East Line.

(b) Even if, as evidently will someday be the case with the five C-4 vessels of American Mail Line [J.A. 4], their manning will enter into a subsidy rate determination, the disallowance has many other consequences. The *payment* of subsidy on these positions will be disallowed for many years prior to the use of these vessels for *rate-making.* Thus, the Board's disallowance went to *both* "subsidy rate-making and subsidy payment" [J.A. 9, 10], and it has stayed only pending reconsideration its demand for refund of past subsidy payments in the amount of about $3.4 million [J.A. 4, 57]. In addition, and also independently of rate-making, the Acting Maritime Administrator disallowed wage payments of these positions for purposes of computing recapture and reserve fund requirements [J.A. 10-11].

(c) Even for the line or lines whose fleets happen in one or more years to make these C-4 vessels predominant, and even for the confined purpose of subsidy rate-making, these appellants have no idea what effect the Board in a subsequent § 606(1) hearing will give to the Board's earlier, non-adversary determination of April 11, 1968. If the Board should not reverse that determination, we should urge in any § 606(1) hearing that the 1968 non-adversay determination cannot conclude the statutory hearing. But, even with the help of the Government's brief in this Court, we should be surprised if the Board would hold that its present manning decision, which took 7 years to ripen [J.A. 4] and which seems to have been under Board consideration in 1965 and again in 1967-1968 [J.A. 65], was a mere nullity. Even if it did so state, we should be skeptical that any tribunal composed of mortal men could put completely out of mind their earlier determination.

(d) The Board, in contrast to the Government brief in this Court, was under no doubt that it was making more than an "initial" or "intermediate" decision. Its determination advised the operators of their right to file a petition for review by the Secretary of Commerce under § 6 of Dept. Order No. 117-A [J.A. 11]; this is not possible if there remains an unexhausted remedy before the Maritime Subsidy

Board, nor is it for interlocutory decisions. Dept. Order No. 117-A, § 6.05, P&F, SR, p. 105:105.[5]

4. *The § 606(1) Hearing.* The Government brief twice emphasizes [pp. 8, 43] that we have no need to know the reasons for the Board's action because in any hearing under Section 606(1) we would have the full protections of the Administrative Procedure Act. We have no doubt that this *should* be the case. Unfortunately, it is not. The Board has quite categorically held that the Administrative Procedure Act is inapplicable to these proceedings, in consequence of which the Board may withhold from that hearing the data upon which it acted in determining the subsidy rate, and may refuse to receive any evidence which was not before the Board when it by earlier administrative action fixed the rate under challenge. *American President Lines–Subsidy Rate Determination.* 7 P&F SRR 613, 626-629 (1966). We hope in the future[6] stoutly to assert that the Department of Justice is right, and that the Board is wrong. Until we should succeed, or unless this Court is prepared in this respect to convert the Government's brief into law binding on the agency, this argument of the Government must be rejected.

5. *Historical Data.* We made two requests of the Board: (a) a statement of the reasons for its April 11 determination and a summary of the evidence upon which it acted; and (b) access to historical data relating to vessel manning

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[5]Indeed, the appellants were directed on the basis of this decision of the Board to refund about $3.4 million of past subsidy payments [JA 4, 56-57], a direction which was stayed only in consequence of a "misunderstanding" by the Pacific Coast District Finance Officer of the effect of the Board's agreement to reconsider the decision [JA 57]. A direction to refund millions of dollars of subsidy payments from 1961 to date is hardly the normal consequence of an "initial" or "intermediate" action.

[6]The Board will not make final subsidy payment of amounts concededly due so long as any issue remains in dispute. This coercion sometimes, as in the case cited, makes judicial review impracticable.

[J.A. 46-48]. The Board made much of the historical manning data available. We were and are grateful for its efforts, and have so stated. The Government brief seems to argue that if we "acknowledged" our appreciation, we have somehow lost the foundation to complain that we do not know why the Board made its determination [Br. 7]. The two areas are, of course, quite unrelated. We were able with the historial data made available by the Board to trace the history of vessel manning over the past 30 years with more precision and in less time than if we were denied access to that central reservoir of information. But this historical data does not in any way explain why the Board made its determination; indeed, it heightens the mystery.

6. *Meaningful Submission.* The Government advises that we have filed with the Board a 141 page "Brief on Reconsideration" with an annexed volume of 152 exhibits, and considers that this shows we do in fact know what arguments to make to the Board [Br. 8, 12, 142]. The elaboration of our presentation shows, in truth, just the opposite. As we don't know what is in issue and what is not, so we felt obliged to develop all of the matters which we guessed might have or should have motivated the Board.

In fact, even with 141 pages, we failed completely to imagine the one factual ground which the Government's brief advances to justify the decision on the merits: "The Board also denies plaintiff's assertion *** that the collective bargaining agreements *** expressly required itemized crewing in the number of 58 men" [Br. 12]. The reason we failed to imagine this ground of decision is that it is wholly contrary to fact: each disallowed position is specifically required by a collective bargaining agreement.[7] If this *were* the ground of the Board's decision, and had we but known it, we could have reduced our brief to 10 pages with 4 annexed exhibits.

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[7]This Court is not concerned with the merits, nor is it able to go beyond this record. The Government's statement is, therefore,

C. The Purposes of the Act

1. *In General.* One can read the 45 pages of the Government brief without finding the slightest recognition that the Freedom of Information Act was intended to eliminate "government by secrecy"[8] and to ensure that no agency would "be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."[9] Instead, the whole thrust of the brief would indicate that the enactment was designed in large measure to ensure that *no* intra-agency memorandum, of whatever type or whatever the need, should ever be exposed to public view.

2. *Burden.* The Government makes no comment on a striking feature of §552(a) (3): in authorizing the district court to compel production of the document, the Act provides that "the Court shall determine the matter de novo and the burden is on the agency to sustain its action." We know of no other instance in the whole body of Congressional legislation where the usual limits of judicial review of agency action have in this way been reversed. The Congress plainly intended to saction non-disclosure only where there was strong justification.

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improper. However we welcome it as a vivid demonstration of the difficulties encountered in showing error in a decision whose grounds are secret. The Government counsel, having reported the Board's views to this Court, might be good enough to direct the Board's attention to Appendix A of the agreements between the Seafarers' International Union and the Pacific Maritime Association of 1961 and 1965 and to the Marine Staff Officers agreements of 1958 and 1965 with PMA and APL. These agreements specifically cover all positions involved in the Board's disallowance. If the Government's statement quoted in the text means that no single agreement covered all 58 positions it is, of course, literally accurate (for it takes five union agreements to cover the 58 positions) but would then be misleading both in purpose and effect.

[8]Sen. Rpt. No. 813, 89th Cong., 1st Sess. (1965), p. 10.

[9]Statement of President Johnson, 2 Weekly Comp. of Pres. Docs. 895 (1966).

The reversal of the usual burden of proof seems to us to defeat the Government's principal argument. It urges that the disclosure of internal agency memoranda would prevent or at least inhibit the full and frank discussion which is necessary for effective Government [Br. 16, 20, 23, 32]. But one can accept this ground for non-disclosure without leaping to the Government's conclusion that it forbids production of *any* internal memorandum, however free it might be of grounds of embarrassment or other interference with the process of Government. No such claim is made with respect to the particular memorandum here sought. It is surely not consistent with the purpose of the Act, nor a discharge of the Government's burden, to say that *this* memorandum should be kept secret because *other* memoranda might prove embarrassing. Yet the Government claims no more.

Again, the Government's analysis of the law of privilege as applied to intra-agency memoranda is that memoranda narrating facts are not privileged, while those discussing matters of law or policy or decision-making are privileged [Br. 21, 27, 29, 31, 40]. Yet there is nothing to show that pages 1-26 of the staff memorandum on which the Board acted did not consist partially, largely or entirely of factual material. Surely, if the burden rests upon the agency resisting disclosure, it must show that there was no factual material in the memorandum which it wishes to keep secret. It has made no such showing.[10]

3. *Secret Law.* We join with the Government [Br. 38] in reliance upon the penetrating discussion of the Act by Professor Davis in *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967). In contrast to the Government's argument here, Professor Davis recognizes that the intra-agency memorandum exception of § 552(b)(5) must be read along with the evident purposes of the Act, not as a self-contained and overriding direction for secrecy.

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[10] Indeed, the Government brief suggests that a factual error—as to the terms of the collective bargaining agreements—may have been critical to the Board's decision (*supra*, note 7, pp. 8-9).

He takes issue with the Department of Justice because (p. 797):

> "The *Attorney General's Memorandum* does not seem to take account of such possible facts as that the 'opinions and interpretations' may constitute the working law of the agency, that the agency's employees may be instructed to apply such law in all individual cases, that the agency may be systematically withholding such law from affected parties, and that therefore the effect of non-disclosure may be to protect an outrageous system of secret law. * * * The problem, unrecognized by the *Memorandum*, is the accommodation of the purpose behind the requirements of subsection (b) to the purpose behind the fifth exemption. I think such an accommodation calls for disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be. The need for secret communication among officials within the government should be recognized, but so should the need for prohibiting all secret law.
>
> * * *
>
> "To the extent that such a memorandum states the effective law of the agency, its adoption by the agency makes it something more than the work product of the legal staff, even though the adoption appears in the agency's records only in such forms as 'application granted' or 'application denied'."
>
> "The governing principle, which I think is without exception, is that secret law is forbidden."

4. *The Agency Cannot Manufacture Circumstances to Justify Secret Law.* We find no discussion in the Government brief of our charge that the argument against disclosure is a contrived one [Appellants Br. 27-28]. If disclosure of the reasons given in the staff memorandum would be embarrassing or harmful to the agency, or to its staff, it need only provide its own statement of reasons for its actions

or direct the staff to redo its memorandum so that the grounds of agency action may be disclosed. Though its staff considered such a statement of reasons to be feasible, the Board refused our specific request for such a statement [JA 4-5]. We do not, of course, urge that such a statement can be compelled under the Freedom of Information Act [cf. Gov't Br. 12] but stated it in our complaint as an alternative which the Board could choose if so minded [JA 6]. The point is that when the Board refuses to make available either the memorandum upon which it acted *or* a statement of its reasons, its objective is obviously not the preservation of "full and frank discussion" by its staff but instead the preservation of secrecy. That is not a permissible objective, whether before or after the Freedom of Information Act.

D. The Document Is No Longer an Intra-Agency Memorandum

The affidavit of the Board's Assistant Secretary states [JA 38] that the Board on receipt of a staff recommendation—

> "may accept the contents and opinions thereof, may arrive at different conclusions than those suggested, or may reject the entire memorandum and/or direct further study."

We do not urge that the Freedom of Information Act grants us access to a memorandum which has been rejected by the Board. But here the Board considered the memorandum and directed that its five concluding pages be copied out as the finding and determination of the Board [JA 65]. If pages 27-31 of that memorandum are by the Board's adoption translated into a multimillion dollar retroactive penalty against these plaintiffs, it stretches common sense too far to say that pages 1-26, which presumably explain why this extraordinary action was taken, remain a purely internal staff memorandum of the Board. Those pages are the foundation of the Board action which has had a catastrophic external impact.

The Government's brief (pp. 18-19) disputes our conclusion by adjectives of some force—"abundantly clear," "utterly fallacious," "bare assertion," "conclusively establishes,"—but advances no reason other than the affidavit of the Board's Assistant Secretary why this memorandum has not been given external effect. That affiant [JA 39]—

> "states without qualification that the Board did *not approve* the internal staff memorandum and *convert* it into a final opinion and order, as claimed by the plaintiffs. The suggested wording of that portion of the memorandum entitled "Recommendation" was utilized by the Board and, with insignificant stylistic changes, was set forth in the letter to all plaintiffs dated April 12, 1968, * * *."

The italics were supplied by the Assistant Secretary, and suggest strongly that he was speaking only to the absence of a formal approval or adoption of pages 1-26 by the Board. When it is remembered that the Board had nothing else before it, and that the five pages of recommendations were "found and determined" by the Board, it should take something more than this carefully phrased negative to show the Board did not accept the staff's reasons as well as the recommendation which those reasons produced.

E. The Memorandum Would be Available in Litigation

1. *"Party" or General Public.* The Government goes to some effort to show that our need (which it elsewhere disputes) to see the staff memorandum does not justify its production, since the Act is directed to information available to any member of the public, and is not as is discovery directed to the needs of a particular litigant [Br. 34-39]. The argument perverts the sense of § 552(b)(5) and the history of its origin.

(a) As the Government correctly points out [Br. 27-29], the Congress had difficulty with the language of exception (5). In its first version, it exempted "internal memorandums

relating to the consideration and disposition of adjudicatory and rule-making matters." This was changed to memoranda "dealing solely with matters of law or policy."[11] This in turn was opposed by Government spokesmen because any memorandum with *any* factual material would then be subject to public disclosure.[12] The difficulty was finally resolved by adopting the standard used for discovery in litigation: the exemption was confined to matters "which would not be available by law to a party other than an agency in litigation with the agency."

Thus, we agree that anything available under the Act is available to any member of the public. But to determine what is available, exception (5) relies upon what a private party could obtain in litigation with the agency. As we could rather plainly obtain this memorandum by discovery procedures in litigation with the agency (*infra*, p. 15), so any member of the public (including ourselves) can obtain

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[11]We believe this greatly narrowed the earlier exceptions, while the Government urges that it broadened it [Br. 28]. The dispute has relevance only insofar as it may indicate that the Congress sought to remedy or to reject the complaint made to it of the Maritime Board procedures [Gov't Br. 28]. We believe that, in rejecting an exemption of everything which underlay adjudication or rule-making, the Congress rejected the desire of this Board to cloak the secrecy of the grounds of its decision in the shrouds of a staff memorandum. See, also, the assurance given a member of the Merchant Marine and Fisheries Committee by the floor leader of the bill, that it would serve to remedy the secrecy of the Board's reasons for establishing construction differential subsidy rates "unless it is exempted by statute" (obviously referring to the Merchant Marine Act, not the pending bill). 112 Cong. Rec. 13013 (daily ed., June 20, 1966).

[12]See, e.g., Hearings before Subcommittee on Administrative Practice and Procedure of Senate Judiciary Committee on S. 160, S. 1336, S. 1758 and S. 1879, 89th Cong., 1st Sess. (1965) (Statement of views of Commerce Department at 406, Defense Department at 417, Labor Department at 437, FAA at 446, FCC at 450); Hearings before a Subcommittee of the House Committee on Government Operations on Federal Public Records Law (Part I), 89th Cong., 1st Sess. (1965) (Statement of views of Department of Justice at 205, Maritime Administration at 216, Treasury Department at 229-230).

it under the Freedom of Information Act. The Government's real complaint is not that we seek premature discovery [Br. 38-39], but rather that the Congress in exemption (b)(5) adopted the scope of private discovery as the test of public availability. We do not know how the Government can contest this evident conclusion, since its brief not only quotes but italicizes the sentence in the House Report [No. 1497, 89th Cong., 2d Sess., 1966, p. 10] which explains "Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." [Br. 32].

2. *The Court of Claims.* The Government agrees that our ultimate judicial remedy would be in the Court of Claims [Br. 9]. Yet it passes by in virtual silence [cf. n. 19, Br. 38] the cases in the Court of Claims which seem to us dispositive of the matter, where similar staff memoranda acted on by the same agency were ordered produced over the same objections, relating to "full and frank discussion" by the staff, which are made here [Appellants Brief 19-20].[13]

The Government relies, instead, upon an unpublished order of this Court which directed the Board's predecessor[14] to file with this Court its minutes, but excepting "material other than the foregoing, for example, internal staff memoranda and recommendations" [Br. 28], *Associated Banning v. United States,* CADC No. 13,384, Sept. 21, 1956. The Government might have added that the issue was not that of discovery, but instead a motion to supplement the record of the official proceedings; that the motion (filed Aug. 27,

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[13]The rulings were "without prejudice to the right of the Secretary of Commerce to file within ten days a claim of executive privilege" [JA 32], in which case it would "be given appropriate consideration" [JA 30]. No such claim was made and all the memoranda were produced.

[14]The predecessor agency was the Federal Maritime Board, which had also jurisdiction under the Shipping Act, 1916, with its orders under that Act subject to Hobbs Act review.

1956) sought *only* to have the minutes certified; and that the minutes themselves contained the staff memoranda which were explanatory of the Board's action [JA No. 13, 384, pp. 149-165]. The case, in truth, stands for the proposition that the memoranda upon which the Board acts *are* a part of the formal action of the Board, while *other* "internal staff memoranda and recommendations" are not.

3. *Other Courts.* If we follow the Government's argument it runs this complex course: (a) Non-factual memoranda discussing law or policy are ordinarily subject to the claim of executive privilege [Br. 21-27]. (b) Although in discovery litigation the particular needs of a litigant may outweigh the privilege, that is irrelevant under the Freedom of Information Act, which is directed to the public generally [Br. 39-43].

We have already shown (*supra*, pp. 14-15) that if a party in discovery litigation could obtain the document, so may any member of the public under the Freedom of Information Act.

So, too, we have already shown (*supra*, pp. 5-7) that the Government's assertion that we have no need to know the grounds of the Board's determination rests upon the flatly false premises that (i) only subsidy rate-making is affected, and (ii) we would have a full hearing under the Administrative Procedure Act if we are dissatisfied with the resulting subsidy rate.

As the Government is demonstrably wrong in its effort to show that we have no "need," and that it would be irrelevant if we did, it is not of critical importance whether the Government or the plaintiffs' brief more accurately summarizes the law of executive privilege. In truth, we believe there is only a difference of phrasing between us. The Government finds a privilege for legal or policy memoranda (as opposed to those relating facts) which has frequently been overcome when the litigant needs to know the basis of the governmental action [Br. 40-41]. We read the cases as refusing to extend the privilege to staff memoranda which

are necessary to explain the basis of otherwise unexplained governmental decisions [Appellants Br. 22-25]. The rather narrow issue between us cannot be resolved until someday there should, somewhat improbably, be a case where one moving for discovery cannot show that he has a need for the memorandum which alone can explain the agency action.

This field of the law is not very tidily arranged, and both the plaintiffs and the Government would have difficulty in fitting every decision into the preferred pattern. Thus, the Government's analysis breaks down with *Bank of Dearborn v. Saxon*, 244 F. Supp. 394 (E.D. Mich.), aff'd on other grounds, 327 F.2d 496 (CA 6, 1967), where the Court allowed the claim of privilege for internal memoranda as to facts but denied it as to "the legal justification for what was here done, its reasons and motivations."[15] We for our part have to point out that broad statements as to the privilege for "opinions and recommendations submitted for consideration in the performance of decision- and policy-making functions" are made in the context of cases where these memoranda are sought to supplement or to discredit what the agency has by opinion or statement already announced as the reasons for its action, *United States v. Morgan*, 313 U.S. 409 (1941); *N.L.R.B. v. Botany Worsted Mills*, 106 F.2d 263 (CA 3, 1939),[16] or where in private litigation one party or the other seeks to draw upon information available in the files of a Government agency, *Freeman v. Seligson*, No. 20,478, CADC, 1968, slip opin. pp. 18-20; *Machin v. Zuckert*, 114 App. D.C. 335, 316 F.2d 336 (1963).

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[15] See, too, *Timken Roller Bearing Co. v. United States*, 28 F.R.D. 57, 64-68 (N.D. Ohio, 1964), that plaintiffs were entitled to know the basis for the I.R.S. deficiency assessment.

[16] In *Boeing Airplane Co. v. Coggeshall*, 114 App. D.C. 338, 280 F.2d 654 (CADC, 1960), one is indeed forced to go to § 105(a) of the Renegotiation Act (requiring that the Board furnish "a statement of such determination, of the facts used as a basis therefor, and of its reasons for such a determination) and to the briefs of the parties (Appellant Reply Brief, pp. 5, 11) to learn that in fact the agency action had been formally explained.

Whatever the imprecision of the case law, the plaintiffs and the Government seem to be in agreement that if sufficient need were shown the memorandum would be available through discovery in litigation with the agency. We hardly believe that any could doubt that one has a great need to know the reasons for a decision if he is to present a meaningful case for its reconsideration. The Government's effort to show that the decision is unimportant because it will take effect only in connection with rate-making, where we can have an Administrative Procedure Act hearing under Section 606(1), profoundly mistakes both the operation of the subsidy system and the Board's decisions as to the nature of a Section 606(1) hearing (*supra*, pp. 5-7). In sum, under the Government's analysis as well as our own, once the Board procedures and our needs are understood, the memorandum in question seems plainly "available by law to a party other than an agency in litigation with the agency." It is, accordingly, available under the Freedom of Information Act, and the District Court should have ordered its production.

CONCLUSION

The judgment of the district court should be reversed, with directions to grant the plaintiffs' cross-motion for summary judgment, in order that plaintiffs can know the reasons for the seriously adverse action of the Board which it is seeking to have reconsidered. Secret government is detrimental equally to the agency and to the citizen subject to its unexplained action.

Respectfully submitted,

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